150 US 128

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RECORD, CASE No. 13,917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~285~~. 57

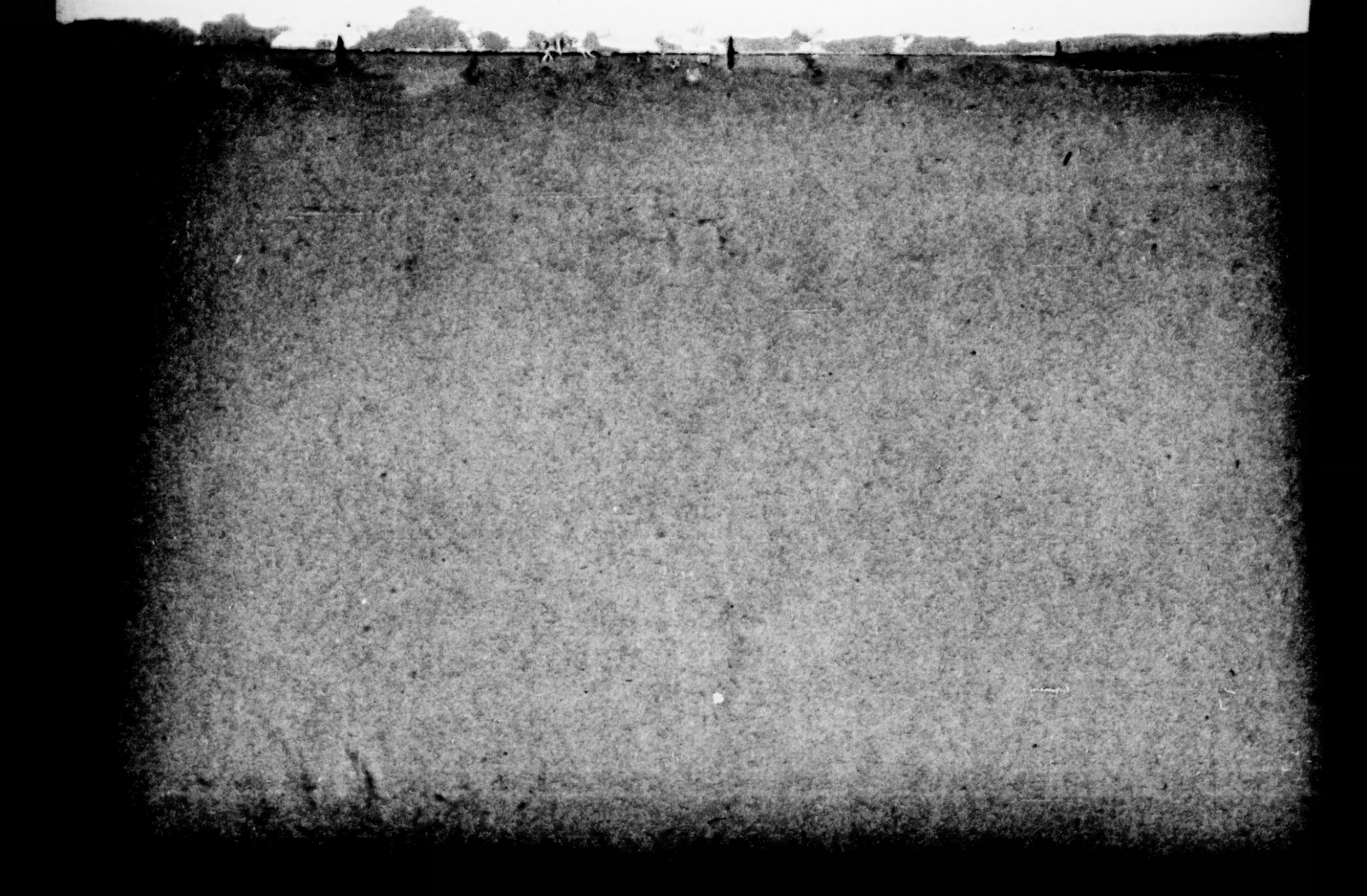
WILLIAM RADER, ALMON SPENCER, CHARLES MAYNE, LOUIS HEITMAN, ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

FLETCHER MADDOX AND WILLIAM GADDIS.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED NOVEMBER 11, 1889.



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a In the Supreme Court of the Territory of Montana.

FLETCHER MADDOX, Pl'ff, and WILLIAM GADDIS, Intervenor, Respondents,
vs.
WILLIAM RADER *et al.*, Def'ts & Appellants.

Filed July 2nd, 1889.

R. L. WORD, *Clerk.*

1 In the District Court of the Fourth Judicial District of the Territory of Montana in and for the County of Meagher.

FLETCHER MADDOX, Plaintiff; WILLIAM GADDIS, Intervenor,
vs.
WILLIAM RADER, Sheriff; ALMON SPENCER, CHARLES MAYN, and Louis Heitman, Copartners under the Firm Name of Spencer, Mayn & Heitman; Elmer J. Anderson, James T. Anderson, and J. L. Dilworth, Copartners under the Firm Name of Anderson Bros. & Co.; George F. Danzer, P. H. Maloney, and William Luppold, Defendants.

Be it remembered that on the 29th day of October, 1887, the above-named plaintiff, Fletcher Maddox, filed his complaint in the above-entitled action; which said complaint is as follows, to wit:

Title of Cause.

Complaint.

Now comes the plaintiff in the above-entitled action and complains of the above-named defendants, and for cause of action alleges:

2 I. That the said defendants Almon Spencer, Charles Mayn, and Louis Heitman are now and at all times hereinafter mentioned were copartners doing business in Meagher county, Montana Territory, under the firm name and style of Spencer, Mayn & Heitman.

II. That the said defendants Elmer J. Anderson, James T. Anderson, and J. L. Dilworth are now and at all times hereinafter mentioned were copartners doing business in Meagher county, Montana Territory, under the firm name and style of Anderson Bros. & Company.

III. That the defendant William Rader is now, at all times hereinafter mentioned was, the duly elected, qualified, and acting sheriff of Meagher County, Montana Territory.

IV. That on the 6th day of December, A. D. 1886, and prior to the entering upon the duties of the office as sheriff as aforesaid, the said William Rader executed to the Territory of Montana a penal bond in the sum of five thousand dollars ($5,000), conditioned that the said William Rader should well, truly, and faithfully perform

all the official duties then required of him by law and should truly and faithfully perform all the duties of such office of sheriff required by any law enacted subsequently to the execution of said bond; that said bond was signed by the said William Rader as principal and the said defendants P. H. Maloney, William Luppold, George F.
Danzer, Spencer, Mayn and Heitman, copartners as aforesaid,
3 and Anderson Bros. & Co., copartners as aforesaid, as sureties, and that the said bond, accompanied by the affidavit of the sureties as to their qualifications and the oath of office of the said William Rader, was thereafter, to wit, on the 8th day of December, 1886, duly approved and filed in the office of the county clerk and recorder of said Meagher county; a copy of which said bond, affidavit, and oath of office is here-nto annexed, marked "Exhibit A," and hereby made a part of this complaint.

V. That on the 9th day of August, A. D. 1887, this plaintiff placed in the hands of the defendant William Rader a certain chattel mortgage bearing the date July 9th, 1886, executed by P. D. Kinyon, to secure the payment to this plaintiff of the sum of seven thousand three hundred and thirteen ($7,313.00) dollars, due in one year, with interest at the rate of one and one-quarter (1¼) per cent. per month from date thereof, and to secure the payment to one William Gaddis of the sum of three thousand ($3,000.00) dollars, with like interest for one year from said date, directing the said William Rader, as sheriff, to take into his possession the property described in the said chattel mortgage and to sell the same and to apply the proceeds of such sale according to the law in such case provided and the terms and provisions of said chattel mortgage; a copy of which said chattel mortgage is hereunto annexed, marked "Exhibit B," and hereby made a part of this complaint.

VI. That the said William Rader, between the 9th day of August, 1887, and the 30th day of August, 1887, took pos-
4 session of the said property and advertised the same for sale at public auction, and did between the said 30th day of August, 1887, and the 5th day of September, 1887, sell, as plaintiff is informed and believes, a large portion of said property at public auction for the sum of ten thousand and seven hundred and thirty-five dollars, and did thereafter, to wit, on or about the 5th day of September, 1887, release and return the balance of said property then unsold to the said P. D. Kinyon upon the payment by him, the said Kinyon, to the said William Rader of a sum of money which, added to the sum of ten thousand seven hundred and thirty-five dollars aforesaid, was sufficient to fully satisfy and discharge the principal sums named in the said chattel mortgage, together with accumulated interest thereon from the date of said chattel mortgage, together with all costs, charges, commissions, attorneys' fees, and disbursements incident and necessary to said sale.

VII. That on or about the said 5th day of September, A. D. 1887, there was due to this plaintiff the principal sum of seven thousand and forty-three ($7,043.00) — and interest thereon as provided in said mortgage, amounting in all to the sum of eight thousand one hundred and eighty-seven ($8,187.00) dollars.

VIII. That on or about the 15th day of September, A. D. 1887, the said William Rader paid to this plaintiff the sum of two thousand eight hundred and seventy-two and $\frac{31}{100}$ ($2,872.31) dollars, leaving a balance still due and unpaid in the sum of five thousand three hundred and fourteen and $\frac{69}{100}$ ($5,314.69) dollars.

IX. That on or about the 17th day of September, A. D. 1887, at the town of White Sulphur Springs, in said county and Territory, this plaintiff demanded of the said William Rader the payment of the said balance of $5,314.69, but that the said William Rader, in violation and disregard of the law and his duty in the premises and contrary to the obligations and conditions of this said official bond, refused and neglected and still refuses and neglects to pay this plaintiff the said sum of $5,314.69, although frequently requested so to do.

Wherefore plaintiff prays judgment against the said defendants for the sum of five thousand three hundred and fourteen and $\frac{69}{100}$ ($5,314.69) dollars, with interest thereon at the rate of ten per cent. per annum from the said 15th day of September, A. D. 1887, and costs of suit in this behalf expended.

CARTER & CLAYBERG,
WADE, TOOLE & WALLACE, &
N. B. SMITH,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Lewis & Clarke, } ss:

Fletcher Maddox, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to such matters therein stated upon information and belief, and as to such matters he believes it to be true.

FLETCHER MADDOX.

Subscribed and sworn to before me this 15th day of October, A. D. 1887.

J. H. CARTER,
Notary Public.

EXHIBIT "A."

Know all men by these presents that we, William Rader, as principal, and Spencer, Mayn & Heitman, Anderson Bros. & Co., George F. Danzer, P. H. Maloney, and William Luppold, as sureties, are held and firmly bound unto the Territory of Montana in the penal sum of five thousand dollars, lawful money of the United States of America; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Dated this 6th day of December, 1886.

The condition of this obligation is such that whereas the above-

bound principal, William Rader, was on the second day of November, A. D. 1886, elected to the office of sheriff in and for the county of Meagher, Territory of Montana:

Now, therefore, if the said William Rader shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of sheriff required by law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

7 WILLIAM RADER.
SPENCER, MAYN & HEITMAN.
ANDERSON BROS. & CO.
GEORGE F. DANZER.
P. H. MALONEY.
WM. LUPPOLD.

Oath of Sureties.

TERRITORY OF MONTANA, } ss:
County of Meagher, }

We, L. Heitman, for Spencer, Mayn & Heitman; J. T. Anderson, for Anderson Bros. & Co.; George F. Danzer, P. H. Maloney, and Wm. Luppold, whose names are subscribed as sureties to the within bond, being severally duly sworn, each for himself deposes and says that he is a resident and tax-payer within said Meagher county; that he is worth the amount for which he becomes surety on said bond over and above all debts and liabilities in unincumbered property situated within this Territory, exclusive of property exempt from execution and forced sale.

SPENCER, MAYN & HEITMAN,
Per L. HEITMAN.
ANDERSON BROS. & CO.,
Per J. T. ANDERSON.
GEORGE F. DANZER.
P. H. MALONEY.
WM. LUPPOLD.

Subscribed and sworn to before me this 6th day of December, A. D. 1886.

R. G. WRIGHT,
[SEAL.] *Notary Public.*

8 *Oath of Office.*

TERRITORY OF MONTANA, } ss:
County of Meagher, }

I do solemnly swear that I will support, protect, and defend the Constitution of the United States and the organic act of the Territory of Montana, and that I will discharge the duties of my office with fidelity; that I have not paid or contributed or promised to pay or contribute, either directly or indirectly, any money or other

valuable thing to procure my election except for necessary or proper expenses expressly authorized by law; that I have not knowingly violated any election law of the Territory or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office other than the compensation allowed by law.

WILLIAM RADER.

Subscribed and sworn to before me this 6th day of December, A. D. 1886.

R. G. WRIGHT,
[SEAL.] *Notary Public.*

(Endorsed as follows:) Official bond of William Rader, sheriff. Filed December 8th, 1886. Approved December 8th, 1886.
9 J. V. Stafford, chairman board of county commissioners. Approved December 8th, 1886. L. Rotwitt, county clerk. Approved December 18th, 1886. B. W. Badger, probate judge. Filed for record the 8th day of December, 1886, and recorded in Book E of Misc., on page 93, records of Meagher county, Montana Territory. L. Rotwitt, recorder.

EXHIBIT "B."

This indenture, made the 9th day of July, in the year of our Lord one thousand eight hundred and eighty-six, between P. D. Kinyon, of the county of Meagher, Territory of Montana, party of the first part, and Fletcher Maddox and William Gaddis, of said county and Territory, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of ten thousand three hundred and thirteen dollars ($10,313.00), lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto the said parties of the second part, their heirs and assigns, executors and administrators, all those certain goods and chattels now being in and upon the
10 range west of Camas creek and in the neighborhood of Fort Logan, county of Meagher and Territory of Montana, and particularly described as follows, to wit:

Four hundred (400) head of horses, comprising mares, fillies, geldings, and colts, it being the intention of this description to cover all the horses of any kind now owned by said first party in said Territory.

Said horses are branded with the letter u upon the left thigh, thus, U, the said brand being the recorded brand of the said first party; also some horses being branded with an apple brand on the left thigh and vented with the same on the left shoulder, thus, Q:

To have and to hold all and singular the said goods and chattels

above described unto the said parties of the second part, their executors, administrators, and assigns forever.

This grant is intended as a mortgage to secure the payment of two certain promissory notes, of even date herewith, executed and delivered by the said P. D. Kinyon to the said parties of the second part, of which the annexed are copies.

$3,000. WHITE SULPHUR SPRINGS, MONTANA, *July 9th*, 1886.

One year after date I promise to pay to the order of William Gaddis three thousand dollars, for value received, payable at the First National Bank of White Sulphur Springs, Montana, with interest from date at the rate of fifteen per cent. per annum until paid.

(Signed) P. D. KINYON.

11 No. —. Due ——.

$7,313. WHITE SULPHUR SPRINGS, MONTANA, *July 9th*, 1886.

One year after date I promise to pay to the order of Fletcher Maddox seven thousand three hundred and thirteen dollars, for value received, payable at the First National Bank of White Sulphur Springs, Montana, with interest from date at the rate of fifteen per cent per annum until paid.

(Signed) P. D. KINYON.

No. —. Due ——.

And these presents shall be void if such payment be made as in said promissory notes provided; but in case default be made in the payment of the principal or interest as provided in said promissory notes or either of them, then the said parties of the second part, their executors, administrators, and assigns, are or the sheriff of any county in which the above-described property or any part thereof may be is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, together with an attorney's commission of five per cent., and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns. In case the said power of sale shall be executed by a sheriff, as above authorized, then such sale shall be advertised by such sheriff by posting notices in three public places in said county at least
12 five days prior to such sale, and such sale may be either public or private.

It is further provided that the said party of the first part, his heirs and assigns, shall have the right to remain in possession of and carefully use all of the above-described property until default

be made herein by the said party of the first part: Provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory notes, or if prior to the maturity of said indebtedness said described property or any part thereof shall be attached, seized, or levied upon by or at the instance of any creditor or creditors of the said party of the first part or claimed by any other person or persons, or if the said party of the first part or any other person or persons shall remove or attempt to remove said property or any part thereof from the said county of Meagher or shall conceal, make away with, sell, or in any manner dispose of said described property or any part thereof or shall attempt so to do or if the said parties of the second part shall at any time consider the possession of the said property or any part thereof essential to the security of the payment of said promissory notes, then and in such events or in either of such events the said parties of the second part, their agent or attorney, executors, administrators, or assigns, or such sheriff shall have the right to immediate possession of said described property and the whole or any part thereof and shall have the right, at their option, to take and recover such possession from any person or persons having or claiming the same with or without suit or process and for that purpose may enter upon any premises where said property or
13 any part thereof may be found.

The exhibition of this mortgage or a copy thereof shall be sufficient proof that any person claiming to act for the mortgagee is duly made, constituted, and appointed agent or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the said parties of the second part, their executors, administrators, or assigns.

It is further provided that the said party of the first part shall have the right to sell any of the geldings belonging to the aforesaid band of horses: Provided, however, that the proceeds of any sales that may be made by said first party be and are applied upon the payment of the promissory notes hereby secured.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

P. D. KINYON. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

TERRITORY OF MONTANA, } ss:
County of Meagher, }

P. D. Kinyon and Fletcher Maddox and William Gaddis, the parties to the foregoing chattel mortgage, being severally duly sworn, each for himself says that the said chattel mortgage is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the said mortgagor.

P. D. KINYON.
FLETCHER MADDOX.
WILLIAM GADDIS.

14 Subscribed and sworn to before me this 9th day of July, A. D. 1886.

N. B. SMITH,

[SEAL.] *Notary Public in and for said Territory of Montana.*

TERRITORY OF MONTANA, } ss:
County of Meagher, }

On this 9th day of July, A. D. one thousand eight hundred and eighty-six, personally appeared before me, N. B. Smith, a notary public in and for said Territory of Montana, P. D. Kinyon, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the same person described in and who executed the said foregoing instrument as a party thereto and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

N. B. SMITH,

Notary Public in and for said Territory of Montana.

(Endorsed as follows:)

P. D. Kinyon. Chattel mortgage to Fletcher Maddox and William Gaddis. Territory of Montana, county of Meagher.
15 Filed on the 10th day of July, A. D. 1886, at 9 o'clock a. m. L. Rotwitt, county recorder, by C. E. Wright, deputy recorder.

And thereafter, on the 7th day of April, 1888, the above-named intervenor, by leave of the court first had and obtained, filed his complaint in intervention, which is as follows, to wit:

Complaint of Intervenor.

William Gaddis, who intervenes in the above-entitled action by leave of the court first had and obtained, complains and alleges:

I. That the said defendants, Almon Spencer, Charles Mayn, and Louis Heitman, are now and at all times hereinafter mentioned were copartners doing business in Meagher county, in the Territory of Montana, under the firm name and style of Spencer, Mayn and Heitman.

II. That the said defendants, Elmer J. Anderson, James T. Anderson, and J. L. Dilworth, are now and at all times hereinafter mentioned were copartners doing business in said Meagher county under the firm name and style of Anderson Bros. & Co.

III. That at a general election for county offices held in the said county of Meagher on the 2nd day of November, 1886, the
16 defendant William Rader was duly elected sheriff of said county; that before the third Monday of December, 1886, he duly qualified as such sheriff, and since said last-mentioned date has continually acted and still acts as sheriff of said county.

IV. That on the 6th day of December, 1886, at the said county of Meagher, the said William Rader executed to the Territory of Montana an official bond in the penal sum of five thousand (5,000) dollars, conditioned that the said William Rader should well, truly, and faithfully perform all official duties then required of him by law, and should truly and faithfully execute and perform all the duties of such office of sheriff required by any law enacted subsequently to the execution of said bond; that the said bond was signed by the said William Rader, as principal, and the said defendants, P. H. Maloney, William Luppold, George F. Danzer, Spencer, Mayn & Heitman, copartners as aforesaid, and Anderson Bros. & Co., copartners as aforesaid, as sureties, and that the said bond, accompanied by the affidavit of the sureties as to their qualifications and the oath of office of the said William Rader, was on the 8th day day of December, 1886, duly approved by the county commissioners and the probate judge of said county and accepted and filed in the office of the county clerk and recorder of said Meagher county; that the persons and firms who signed and executed the said bond as aforesaid duly executed the same with the intent that the same should be delivered and accepted as aforesaid, and that a copy of said bond, affidavit, and oath of office, marked Exhibit "A,"
17 is hereto annexed and made a p-rt of this complaint.

V. That on the 9th day of July, 1886, one P. D. Kinyon, of said county, borrowed from said plaintiff and said William Gaddis, jointly, the sum of ten thousand three hundred and thirteen dollars ($10,313) upon an agreement to pay the same at the expiration of one year, with interest at the rate of (15) fifteen per cent. per annum, and for the payment of said sum with interest said P. D. Kinyon on said day duly executed and delivered two several promissory notes, dated on that day, to the payees therein respectively named; that one of said promissory notes was for the sum of three thousand ($3,000) dollars and payable to the order of said William Gaddis one year from the date thereof, and that the other of said promissory notes was for the sum of seven thousand three hundred and thirteen ($7,313) dollars and payable to the order of said Fletcher Maddox one year from the date thereof, and that on the same day the said P. D. Kinyon, to secure the payment of the two said promissory notes, duly executed and delivered to the said William Gaddis and Fletcher Maddox, jointly, a chattel mortgage upon four hundred (400) head of horses and upon all the horses of every kind owned by the said P. D. Kinyon in said Territory, which said mortgage was duly filed with the recorder of said county on the 10th day of July, 1886, a copy of which said chattel mortgage, which contains also a copy of said two promissory notes, is hereto annexed and marked Exhibit "B" and made a part of this complaint.

VI. That at the maturity of said notes default was made
18 in the payment thereof and no part of said notes or either of them was paid or has since been paid, except as a portion of the amounts payable by said notes has been paid by the defendant William Rader as sheriff of said county after the sale by him of a part of said horses, as hereinafter alleged.

VII. That on 9th day of August, A. D. 1887, the said William Gaddis and the said Fletcher Maddox placed in the hands of the said William Rader the said chattel mortgage, and directed the said William Rader, as sheriff as aforesaid, to take into his possession the horses therein described, and to sell the said horses and to apply the proceeds of such sale according to the law in such case provided and the terms and provisions of said chattel mortgage.

VIII. That the said William Rader, as such sheriff, between the 9th day of August, 1887, and the 30th day of August, 1887, took possession of the said horses and duly advertised the same for sale at public auction, and did between the 30th day of August, 1887, and the 5th day of September, 1887, sell, as plaintiff is informed and believes, about one hundred and thirty (130) in number of said horses at public auction and realized from said sale about the sum of seven thousand (7,000) dollars, from which said sum Rader paid the costs and expenses of said sale and paid to said William Gaddis the sum of fifteen hundred and ninety-one dollars and fifty-seven cents ($1,591.57) and to said Maddox the sum of two thou-
19 sand eight hundred and seventy-two dollars and thirty-one cents ($2,872.31), according to the provisions of the said mortgage, and only the sum last aforesaid.

IX. That on or about September 5th, 1887, said William Rader, as such sheriff, voluntarily and in violation of law and duty released and turned over to said P. D. Kinyon about one hundred of said horses, of the value of about forty-five hundred ($4,500) dollars, and did not sell or make any effort to sell the same.

X. That in September, 1887, said William Rader, as sheriff as aforesaid, sold about thirty (30) of said horses and received about fifteen hundred ($1,500) dollars therefor, and has not accounted to plaintiff or said Gaddis for any part of the money received therefor, and that he afterwards and during the same year turned over, and in violation of his duty and the rights of plaintiff and said Gaddis, about one hundred and forty-six (146) of said horses, of the value of about six thousand dollars ($6,000), fraudulently and without consideration, to other persons, and has not accounted to the plaintiff or to said Gaddis for the value thereof or any part of the same.

XI. That on the 5th day of September, 1887, there was due to the said William Gaddis, as principal and interest on said note, made payable to the order of said William Gaddis, the sum of three thousand ($3,000) dollars and interest thereon at fifteen (15) per cent. per annum, amounting in all to three thousand five hundred and eighteen dollars and seventy-five cents ($3,518.75), and to the said
20 Fletcher Maddox the said principal sum of seven thousand and thirteen ($7,013) dollars and interest thereon, amounting to one thousand two hundred and twelve dollars and sixty-seven cents ($1,212.67), amounting in all to eight thousand two hundred and twenty-five dollars and sixty-seven cents ($8,225.67.)

XII. That on or about said 5th day of September, 1887, said William Rader paid to said William Gaddis the sum of one thousand five hundred and ninety-one dollars and fifty-seven cents ($1,591.57)

and to the said Fletcher Maddox the sum of two thousand eight hundred and seventy-two dollars and thirty-one cents ($2,872.31), leaving as a balance due to said William Gaddis on the said promissory note, payable to his order, the sum of one thousand nine hundred and twenty-seven dollars and eighteen cents ($1,927.18), which said last-mentioned sum or any part thereof has not been paid, and leaving as a balance due to said Maddox, according to the information and belief of said William Gaddis, the sum of five thousand three hundred and fifty-three dollars and thirty-six cents ($5,353.36), which said last-mentiones sum or any part thereof has not been paid.

XIII. That the balance due and owing on the said promissory notes secured by said mortgage as aforesaid is the sum of seven thousand two hundred and eighty dollars and fifty-four cents ($7,280.54), and that payment thereof has been duly demanded of said Rader, and that said William Gaddis has duly demanded of said Rader that the sum of one thousand nine hundred and twenty-seven dollars and eighteen cents ($1,927.18) should be paid
21 to him upon his said note, and, as said William Gaddis is informed and believes, said Maddox has demanded of said Rader that the sum of five thousand three hundred and fifty-three dollars and thirty-six cents should be paid to him on the promissory note payable to said Maddox as aforesaid, but that said Rader has disregarded said demands and has refused and still refuses to pay the same or any part of said sum or sums or any sums whatever on account thereof, and that the said Rader has not well, truly, and faithfully performed the duties of his said office of sheriff or the conditions of said bond, but has violated the same, as herein stated and set forth, to the damage of the said Gaddis in the sum of one thousand nine hundred and twenty-seven dollars and eighteen cents ($1,927.18), besides interest, and to the damage of this said Gaddis and said Maddox in the sum of seven thousand two hundred and eighty dollars and fifty-seven cents ($7,280.57), besides interest.

Wherefore the said William Gaddis, the said intervenor in this action, demands judgment against the said defendants (except the said Fletcher Maddox) for the said sum of five thousand dollars.

CARPENTER, BUCK & HUNT,
For William Gaddis.

TERRITORY OF MONTANA } ss:
County of Meahger, }

William Gaddis, being duly sworn, deposes and says: I am the intervenor in the above-entitled action. I have read the foregoing complaint and know the contents thereof, and that the same
22 is true of my own knowledge except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

WILLIAM GADDIS.

Subscribed and sworn to before me this 7th day of April, A. D. 1888.

L. ROTWITT,
[SEAL.] *Notary Public.*

23 EXHIBIT "A."

Know all men by these presents that we, William Rader, as principal, and Spencer, Mayn & Heitman, Anderson Bros. & Co., George F. Danzer, P. H. Maloney, and William Luppold, as sureties, are held and firmly bound unto the Territory of Montana in the penal sum of five thousand ($5,000) dollars, lawful money of the United States of America; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Dated this 6th day of December, 1886.

The condition of this obligation is such that whereas the above-bound principal, William Rader, was, on the second day of November, A. D. 1886, elected to the office of sheriff in and for the county of Meagher, Territory of Montana:

Now, therefore, if the said William Rader shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of sheriff required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

(Sig.) WILLIAM RADER.
SPENCER, MAYN & HEITMAN.
ANDERSON BROS. & CO.
GEORGE F. DANZER.
P. H. MALONEY.
WM. LUPPOLD.

24 *Oath of Sureties.*

TERRITORY OF MONTANA, } ss:
County of Meagher, }

We, L. Heitman, for Spencer, Mayn & Heitman; J. T. Anderson, for Anderson Bros. & Co.; George F. Danzer, P. H. Maloney, William Luppold, as sureties to the within bond, being severally duly sworn, each for himself deposes and says that he is a resident and tax-payer within said Meagher county; that he is worth the amount for which he becomes surety on said bond over and above all debts and liabilities in unincumbered property situated within this Territory, exclusive of property exempt from execution and forced sale.

(Sig.) SPENCER, MAYN & HEITMAN,
Per HEITMAN.
ANDERSON BROS. & CO.,
Per J. T. ANDERSON.
GEORGE F. DANZER.
P. H. MALONEY.
WM. LUPPOLD.

Subscribed and sworn to before me this 6th day of December, A. D. 1886.

R. G. WRIGHT,
[SEAL.] *Notary Public.*

Oath of Office.

TERRITORY OF MONTANA, } ss:
County of Meagher, }

I do solemnly swear that I will support, protect, and defend the Constitution of the United States and the organic act of the Territory of Montana, and that I will discharge the duties of my
25 office with fidelity; that I have not paid or contributed or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure my election except for the necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of the Territory or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office other than the compensation allowed by law.

(Sig.) WILLIAM RADER.

Subscribed and sworn to before me this 6th day of December, A. D. 1886.

R. G. WRIGHT,
[SEAL.] *Notary Public.*

EXHIBIT "B."

This indenture made the ninth day of July, in the year of our Lord one thousand eight hundred and eighty-six, between P. D. Kinyon of the county of Meagher and Territory of Montana, party of the first part, and Fletcher Maddox and William Gaddis of said county and Territory, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of ten thousand three hundred and thirteen dollars ($10,313.) lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby
26 confessed and acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over, unto the said parties of the second part, their heirs or assigns, executors and administrators, all those certain goods and chattels now being in and upon the range west of Camas creek and in the neighborhood of Fort Logan, county of Meagher, and Territory of Montana, and particularly described as follows, to wit:

Four hundred (400) head of horses, comprising mares, fillies, geldings & colts, it being the intention of this description to cover all the horses of any kind now owned by said first party in said Territory.

Said horses are branded with the letter u upon the left thigh thus U, the said brand being the recorded brand of the said first

party, also some horses being branded with an apple brand on the left thigh and vented with the same on the left shoulder, thus Q.

To have and to hold all and singular the said goods and chattels above described, unto the said parties of the second part, their executors, administrators and assigns, forever.

This grant is intended as a mortgage to secure the payment of two certain promissory notes, of even date herewith, executed and delivered by the said P. D. Kinyon, to the said parties of the second part, of which the annexed are copies:

$3,500. WHITE SULPHUR SPRINGS, MONTANA, *July 9th*, 1886.

One year after date I promise to pay to the order of Wil-
27 liam Gaddis three thousand dollars, for value received, payable at the First National Bank of White Sulphur Springs, Montana, with interest from date at the rate of fifteen per cent. per annum until paid.

(Signed) P. D. KINYON.

No. —. Due ——.

$7,313. WHITE SULPHUR SPRINGS, MONTANA, *July 9th*, 1886.

One year after date I promise to pay to the order of Fletcher Maddox seven thousand three hundred and thirteen dollars, for value received, payable at the First National Bank of White Sulphur Springs, Montana, with interest from date at the rate of fifteen per cent. per month until paid.

(Signed) P. D. KINYON.

No. —. Due ——.

And these presents shall be void if payment be made as in said promissory notes provided. But in case default be made in the payment of the principal or interest as provided in said promissory notes or either of them, then the said parties of the second part, their executors, administrators and assigns, are, or the sheriff of any county in which the above-described property or any part thereof may be, is hereby authorized and empowered to sell the said goods and chattels with all and every of the appurtenances, or any part thereof, in the manner prescribed by law; and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, together with an attorney's commission of five per cent., and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns. In
28 case the said power of sale shall be executed by a sheriff, as above authorized, then such sale shall be advertized, by such sheriff, by posting notices in three public places in said county, at least five days prior to such sale, and such sale may be either public or private.

It is further provided that the said party of the first part, his

heirs and assigns, shall have the right to remain in possession of and carefully use all of the above-described property until default be made herein by the said party of the first part; provided expressly however that if default be made in the payment of principal or interest, as provided in said promissory note-, or if prior to the maturity of said indebtedness, said described property, or any part thereof, shall be attached, seized or levied upon by or at the instance of any creditor or creditors of said party of the first part, or claimed by any other person or persons, or if the said party of the first part or any other person or persons, shall remove or attempt to remove said property, or any part thereof, from the said county of Meagher, or shall conceal, make way with, sell, or in any manner dispose of said described property, or any part thereof or shall attempt so to do, or if the said parties of the second part shall at any time consider the possession of said property or any part thereof, essential to the security of the payment of said promissory notes, then and in such events, or in either of such events, the said parties of the second part, their agent or attorney, executors, administrators, or assigns, or such sheriff, shall have the right to the immediate possession of the
29 above-described property, and the whole or any part thereof, and shall have the right at their option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where said property, or any part thereof may be found. The exhibition of this mortgage, or a copy thereof, shall be sufficient proof that any person claiming to act for the mortgagee is duly made, constituted and appointed agent or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the parties of the second part, their executors, administrators or assigns.

It is further provided that the said party of the first part shall have the right to sell any of the geldings belonging to the aforesaid band of horses, provided, however, that the proceeds of any sales that may be made by said first party be and are applied upon the payment of the promissory notes hereby secured.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

P. D. KINYON.

Signed, sealed, and delivered in the presence of—

——.

TERRITORY OF MONTANA, } ss:
County of Meagher, }

P. D. Kinyon, Fletcher Maddox, and William Gaddis, the parties of the foregoing chattel mortgage, being severally duly sworn,
30 each for himself says that the said chattel mortgage is made in good faith to secure the amount *mane*d therein and without any design to hinder or delay the creditors of the said mortgagor.

P. D. KINYON.
FLETCHER MADDOX.
WILLIAM GADDIS.

Subscribed and sworn to before me this 9th day of July, A. D. 1886.

N. B. SMITH,

[SEAL.] *Notary Public in and for said Territory of Montana.*

TERRITORY OF MONTANA, } ss:
County of Meagher, }

On this 9th day of July, A. D. one thousand eight hundred and eighty-six, personally appeared before me, N. B. Smith, a notary public in and for said Territory of Montana, P. D. Kinyon, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the same person described in and who executed the foregoing instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness thereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] N. B. SMITH,

Notary Public in and for the said Territory of Montana.

31 Endorsed as follows:

Copy. P. D. Kinyon to Fletcher Maddox, William Gaddis. Chattel mortgage. Territory of Montana, county of Meagher. Filed on the 10th day of July, A. D. 1886, at 9 o'clock a. m. L. Rotwitt, county recorder, by C. E. Wright, deputy recorder.

And on the 22nd day of November, 1887, the defendants filed their demurrer to the complaint of plaintiff Maddox; which said demurrer is as follows, to wit:

Demurrer.

Now come the defendants Spencer, Mayn & Heitman, Anderson Bros. & Co., George F. Danzer, P. H. Maloney, and William Luppold and demur to the complaint of the plaintiff on file herein, and for cause of such demurrer say that as to these defendants the said complaint does not state facts sufficient to constitute a cause of action.

2. And the said defendants, further demurring, say that there is a defect or misjoinder of *of* parties plaintiff in this, to wit,
32 that it appears in and by said complaint that the bond executed by these defendants on behalf of their codefendant William Rader was executed to the Territory of Montana, and there is no assignment of or any interest therein to the plaintiff in this action.

3. That there is a misjoinder of parties defendant in this, to wit, that these defendants are sued jointly with their said codefendant, William Rader, upon a cause of action arising against the said William Rader only.

4. That the several causes of action have been improperly united in this, to wit, that a cause of action arising against said defendant,

William Rader, has been united, and is united with a cause of action against these defendants upon the obligation set forth in said complaint.

SANDERS, CULLEN & SANDERS,
Attorneys for said Defendants.

Demurrer of Rader.

Now comes the defendant William Rader and demurs to the complaint of plaintiff on file herein, and for cause of such demurrer says:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That there is a defect of parties plaintiff in this, to wit, that it appears in and by said complaint that one William Gaddis was a mortgagee in said mortgage named and he is not a party to this action.

SANDERS, CULLEN & SANDERS,
Attorneys for Defendants.

33 And thereafter and on the 29th day of April, A. D. 1888, that being one of the days of court of the April term, 1888, the said cause coming on to be heard upon said demurrer of the defendants to the complaint of the plaintiff Maddox, the court, after argument of counsel, overruled said demurrer, the order overruling said demurrer being as follows, to wit:

Order.

"Demurrer overruled; defendant to answer original complaint on or before April 7th."

And thereafter and on the 9th day of April, 1888, the defendants filed their answer to said complaint of plaintiff Maddox; which said answer is in the words and figures following, to wit:

Answer.

The defendants, answering plaintiff's complaint herein—

Deny that the defendant William Rader received at the sale mentioned and described in plaintiff's said complaint the sum of $10,735.00, as alleged in said complaint, or any other or greater sum than $4,390.65.

Further answering, the defendants aver that — said sale one hundred and forty-two (142) horses, mares, and colts were bid off and knocked down to A. B. Kier for the total sum and price of $8,096.50; that in pursuance to instructions from mortgagees in said mortgage mentioned and according to the terms and
34 conditions of an agreement then and there made between said mortgagees and said Kier, whereby said Kier was to pay to said Rader and did pay to him on account of said purchase the sum of $1,752.15, and which is included in the aforesaid sum of

$4,390.65, and was to have the period of five days in which to pay the balance of said sum of $8,096.50, the said Rader to keep and retain said horses, mares, and colts until the full payment of sais sum of $8,096.50, and in the event of Kier's failure to fully pay said sum, the said $1,752.15 to become forfeited to the use of the said mortgagees, and said horses, mares, and colts to be retained by said Rader for and on account of said mortgagees and subject to their orders, the said William Rader retained said sum of $1,752.15 and paid the same over to said mortgagees, it being as aforesaid a part of said sum of $4,390.65, and retained in his said custody said one hundred and forty-two horses, mares, and colts, subject to the order of said mortgagees; that afterwards, to wit, on the — day of September, A. D. 1887, the said Rader notified the said mortgagees of Kier's failure to pay the balance of said sum of $8,096.50 and notified them that said horses, mares, and colts were then and there held by him, subject to their orders, and afterwards, to wit, on the — day of September, 1887, on said mortgagees failing to direct what disposition he should make with the same, the said Rader tendered said horses, mares, and colts to said mortgagees, which they then and there refused to receive, and that said Rader ever since last-mentioned date has had and now has said horses, mares, and
35 colts in his possession, subject to the order and disposal of said mortgagees.

That on, to wit, the 5th day of September, A. D. 1887, P. D. Kinyon, the mortgagor in said mortgage mentioned, tendered and paid to said Rader the sum of $2,459.20, that being the balance due on said mortgage at that time, and demanded the return to him of the property then unsold, which was then held by said Rader, and that thereupon the said Rader returned to the said Kinyon such unsold property and paid over to the said mortgagees the said sum of $2,459.20.

That the total money so as aforesaid by said Rader received was the sum of $6,849.85; that the costs, disbursements, and expenses in and about said mortgaged sale were the sum of $1,445.35, which were paid off and discharged by said Rader; that said Rader for and on account of said chattel mortgage has paid to Fletcher Maddox, mortgagee, the sum of $3,192.93, and to William Gaddis, mortgagee, the sum of $1,591.57.

That the foregoing constituate the acts and facts complained of by the plaintiff herein.

And by way of cross-complaint and by way of counter-claim to plaintiff's complaint herein, the said William Rader alleges that in and about the premises aforesaid, the care and keep of said one hundred and forty-two horses, mares, and colts held by him at plaintiff's orders, he has been put to great expense and has paid out large sums of money, to wit, $400, which plaintiff has refused and failed to pay.

36 Wherefore defendants pray to be herein dismissed with their costs, and that judgment be rendered in favor of said William Rader for the sum of $400 and for general relief.

SANDERS, CULLEN AND SANDERS,
MAX WATERMAN AND
H. G. McINTIRE, *Defendants' Attorneys.*

TERRITORY OF MONTANA, } ss:
County of Meagher, }

William Rader, being duly sworn, says that he is one of the defendants in the above action, and makes this affidavit in behalf of himself and his codefendants herein; that he has read the foregoing answer and knows the contents thereof, and that the facts therein alleged are true of his own knowledge except such as therein stated on information or belief, and as to them he believes said answer to be true.

WM. RADER.

Subscribed and sworn to before me this 7th day of April, A. D. 1888.

MAX WATERMAN,
Notary Public.

37 And thereafter and on the 19th day of September, A. D. 1888, the plaintiff filed his replication to the answer of defendants; which said replication is as follows, to wit:

Replication.

Now comes the plaintiff, Fletcher Maddox, in the above-entitled action and for his replication to the answer of defendants therein—

1. Admits that at said sale said 142 head of horses, mares, and colts were bid off and knocked down to said Kier for said sum of *of* $8,096.50, but denies that the same was done in pursuance to instructions from the mortgagees aforesaid or either of them or according to the terms of and conditions of the agreement set forth in said answer, or that any such agreement or any agreement of any kind, character, or description was had between said mortgagees or either of them and said Kier, or that by any agreement of any kind or character had with said mortgagees or either of them said Kier was to have any period of time whatever in which to pay for said horses, or that in the event of a failure of said Kier so to pay therefor any of said horses, mares, or colts so sold to said Kier by said Rader were to be retained by said Rader for or on account of said mortgagees or either of them.

Denies that said Rader retained said 142 head of horses, mares, and colts subject to the order of said mortgagess or either of them, and on the contrary upon information and belief avers that said Rader held said horses under his own control and direction for the purpose of enabling said Kier to pay the balance of said sum of $8,096.50 so bid by him pursuant to an understanding and
38 agreement between himself and said Kier at his own risk and hazard for a much longer period than five days, to wit, for the period of thirty days.

Denies that on the — day of September, 1887, or at any other time he, the said Rader, notified the said mortgagees or either of them that said 142 head of horses, mares, or colts, or any thereof, were then or there or otherwise held by him subject to their or

either of their orders, or that he ever tendered said horses or any thereof to said mortgagees or either of them, or that since said last mentioned date or at all he has had or now has said horses, mares, or colts or any thereof in his possession or subject to the order or disposal of said mortgagees or either of them; but on the contrary on information and belief avers that for a long period after said sale he retained said horses to enable said Kier to pay said balance, and personally and actively assisted said Kier in efforts to raise the money necessary to obtain the same, and that thereafter and in the month of October, 1887, failing in said efforts, he of his own accord ende-vored to resell said horses at such a sum as would save him harmless; that during the time he so held said horses he sold a number thereof to persons to plaintiff now unknown and received the proceeds of such sale or sales in cash; that thereafter and on the — day of October he turned over and delivered the portion of said horses then remaining to his codefendants herein, who then received and branded the same; that since the date last aforesaid his said codefendants have sold and delivered divers and sundry head of said horses in number and to persons to plaintiff unknown,
and have received and likewise divided among themselves
39 the proceeds of such sale or sales in cash to a great amount, to wit, $1,500.00 and upwards.

Admits that said Rader paid plaintiff said sum of $3,192.93, and to said Gaddis said sum of $1,591.57, but as to the remaining sums alleged to have been received or paid by him in money plaintiff has not sufficient information to positively deny, and therefore upon information and belief denies the same.

And for answer to defendants' so-called counter-claim in favor of William Rader upon information and belief plaintiff denies that he has been put to any expense in or about the care or keep of said horses, or that he has paid the sum of $400.00 or any sum whatever on account thereof.

Wherefore, having fully replied, plaintiff prays judgment as in his said complaint asked for.

N. B. SMITH,
CARTER & CLAYBERG AND
WADE, TOOLE & WALLACE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA, }
County of Meagher, } ss:

Fletcher Maddox, being duly sworn, makes oath and says that he is the plaintiff in the above-entitled action; that he has heard the foregoing reply read and knows the contents thereof, and that the
matters and facts therein stated are true of his own knowl-
40 edge save as to those matters therein stated on information and belief, and as to those he believes it to be true.

FLETCHER MADDOX.

Subscribed and sworn to before me this 19th day of September, 1888.

BEN. D. GARDNER,
Deputy Clerk of Courts.

And thereafter and on the 14th day of April, 1888, the defendants filed their demurrer to the complaint of the intervenor, William Gaddis; which said demurrer is as follows, to wit:

Demurrer.

Now comes Almon Spencer, Chas. Mayn, Louis Heitman, Elmer J. Anderson, James T. Anderson, J. L. Dilworth, Geo. F. Danzer, P. H. Maloney, and William Luppold and demur to the complaint of William Gaddis, intervenor herein, and for cause of such demurrer say that said complaint as to these defendants *the said complaint* does not state facts sufficient to constitute a cause of action.

2nd. Further demurring, said defendants say that there is a misjoinder of parties plaintiff, in that the Territory of Montana is not a party to this action, and there does not appear to be any assignment of said bond to the plaintiff or to the said intervenor.

41 3rd. And, further demurring, said defendants say that there is a misjoinder of causes of action in this, to wit, that a cause of action sounding in tort as against their codefendant, William Rader, is united with a cause of action in contract as against these defendants.

SANDERS, CULLEN & SANDERS,
Att'ys for Defendants Above Named.

And the said cause coming on to be heard on the 19th day of September, 1888, upon the demurrer of the defendants to the complaint in intervention, the same was overruled by the court.

"Demurrer of defendants to complaint in intervention overruled; defendants to answer by 9 a. m., 20th inst."

And thereupon and on the 20th day of September, 1888, the defendants filed their answer to the complaint in intervention; which said answer is as follows, to wit:

Answer.

Now come the defendants, and, reserving the objections to the complaint of intervention on file herein specifically pointed out to the said complaint by their demurrer thereto, for their answer to the complaint of said intervenor—

Deny that the defendant William Rader realized from the sale of said horses by him the sum of $7,000 or any other or greater sum than $4,390.65.

2. Deny that on or about September 5th, 1887, or at any other time he, said William Rader, turned over or released to said

42 P. D. Kinyon any of said horses in violation of any law or any duty which he was under to said plaintiffs or either of them.

3. Deny that in the year A. D. 1887 or at any other time the said William Rader, as such sheriff, turned over any of said horses fraudulently or without consideration or in violation of any law or of any duty which he owed to said plaintiffs or either of them.

And said defendants, further answering, aver that at said sale one hundred and forty-two of the horses embraced in said mortgage were bid off by and knocked down to one A. B. Kier for the sum and at the price of $8,096.50; that in pursuance *to* instructions from the mortgagees in said mortgage mentioned the said Rader received the said bids of Kier under and by virtue of an agreement then and there entered into by said mortgagees and said Kier, whereby the said Kier was to pay to the said Rader and did pay to him on account of said purchase the sum of $1,752.15, and which is included in the sum of $4,390.65, and the said Kier was then to have the period of five days in which to pay the balance of said sum of $8,095.50, the said Rader to keep and retain said horses, mares, and colts until the full payment of said sum of $8,095.50, and in the event of Kier's failure to fully pay said sum the said $1,732.15 to become forfeited to the use of said mortgagees and said horses, mares, and colts to be retained by said Rader for and on account of said mortgagees and subject to their order. The said William Rader retained said sum of $1,732.15
and paid the same over to the said mortgagees, it being as
43 aforesaid a part of said sum of $4,390.65, and said Rader retained in his custody said 142 horses, mares, and colts, subject to the order of the said mortgagees; that afterwards, to wit, on the 11th day of September, 1887, the said Rader notified the said mortgagees of Kier's failure to pay the balance of said sum of $8,096.50, and notified them that said horses, mares, and colts were then and there held by him subject to their order, and afterwards, on, to wit, the — day of October, 1887, on said mortgagees failing to direct what disposition he should make of the same, the said Rader tendered said horses, mares, and colts to said mortgagees, which they then and there refused to receive.

And defendants deny that said Rader after said sale sold thirty head of said horses or any other or greater number than twenty-three head thereof, and they deny that he received therefor the sum of fifteen hundred dollars or any other or greater sum than twelve hundred and seventy-five dollars, which said sum was the reasonable value of the said twenty-three horses so sold by him, and defendants still have the remainder of said horses, mares, and colts and the income thereof in their possession, subject to the order of said plaintiffs.

That thereafter and on the 5th day of September, A. D. 1887, P. D. Kinyon, the mortgagor in said mortgage mentioned, tendered and paid to the said Rader the sum of $2,459.20, that being the balance due on said mortgage at that time, and demanded the return to him of the property then unsold, being the balance
44 of the horses mentioned in said mortgage after sufficient thereof had been sold as aforesaid to satisfy said mortgage, and thereupon the said Rader returned to the said Kinyon such unsold property and duly paid over to said mortgagees the said sum of $2,459.20.

That of the proceeds of such sales the said Rader has paid to the said Fletcher Maddox the sum of $3,192.93 and to the said intervenor, William Gaddis, the sum of $1,591.57.

And the defendants, further answering said complaint and by way of counter-claim, say that since said defendants have refused to receive said horses so bid off as aforesaid by said Kier these defendants have been put to great cost and expense in and about caring for said horses and for herding, driving, and breeding them, in all amounting to the sum of $824.36; that in payment of said expenses they have applied the proceeds of the sale of said twenty-three head of horses so sold by said Rader out of said 142 head bid off by said Kier, and out of said proceeds there remains in their hands yet the sum of $450.64, which said sum and the remainder of said 142 head of horses, mares, and colts so bid off by said Kier the defendants hereby offer to give the plaintiffs if they will receive the same, and these defendants ever have been and yet are ready and willing to deliver possession of said horses, mares, and colts to said plaintiffs and to pay them the said balance so due from said sale of said twenty-three head of horses and all sums so due
45 them from said sale if they would receive the same.

Wherefore defendants pray to be hence dismissed without day and have judgment for their costs.

H. G. McINTIRE,
MAX WATERMAN,
SANDERS, CULLEN & SANDERS,
Att'ys for Defendants.

TERRITORY OF MONTANA, }
County of Meagher, } ss:

William Rader, being first duly sworn, says: I am one of the defendants in the above-entitled action. I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge except as to matters therein stated on my information and belief, and as to such matters I believe it to be true.

WILLIAM RADER.

Subscribed and sworn to before me this 20th day of September, A. D. 1888.

MAX WATERMAN,
Notary Public.

46 And thereafter and on the 21st day of September, 1888, the intervenor, William Gaddis, filed his reply to the answer of the defendants to the complaint in intervention; which said replciation is as follows, to wit:

William Gaddis, intervenor in above-entitled cause, for replication to defendants' answer to his complaint in intervention:

1. Admits that at said sale 142 head of horses, mares, and colts were bid off and knocked down to said Kier for said sum of $8,096.50, but denies that the same was done in pursuance of instructions of the mortgagees aforesaid or either of them or under or according to the terms or conditions of the agreement set forth in defendants' said answer, or that any such agreement or any agreement of any kind, character, or description was had or entered into

between said mortgagees or either of them and said Kier, or that by any agreement of any kind or nature had or entered into with said mortgagees or either of them said Kier was to have any period of time whatsoever in which to pay for said horses, or that in the event of a failure — said Kier so to pay therefor any of said horses, mares, or colts so sold to said Kier by said Rader were to be ret-ined by said Rader for or on account of said mortgagees or either of them.

Admits that said Kier paid to said Rader the said sum of $1,752.15, and that said last-named sum is included in the sum of $4390.65, alleged to have been received in cash upon said sale, but denies that by any agreement whatsoever of the said mort-
47 gagees or either of them the said sum was to be retained by said Rader for five days or any period of time whatsoever, upon any contingency to become forfeited to the use of the said mortgagees or either of them.

Denies that said Rader retained the said 142 head of horses or any number of said horses, mares, or colts, subject to the order of said mortgagees or either of them, and upon information and belief avers that said Rader held said horses under his own control and direction for the purpose of enabling said Kier to pay the balance of said sum of $8,096.50 so bid by him pursuant to an understanding and agreement between himself and said Kier, at his own risk and hazard, for a much longer period than five days, to wit, 30 days.

Denies that on the — day of September, 1887, or at any other time the said Rader notified the said mortgagees or either of them that said 142 head of horses, mares, and colts or any of them were then and there held by him, subject to their or either of their orders, or that he ever tendered said horses or any of them to said mortgagees or either of them, or that since said last-mentioned date or ever at all he has had or now has said horses, mares, or colts or any of them in his possession or subject to the order or disposal of said mortgagees or either of them, but avers on information and belief that for a long time after said sale he retained said horses to enable said Kier to pay said balance, and personally assisted said Kier to raise the money necessary to obtain said horses, and that thereafter and in the month of October, 1887, failing in said
48 efforts to assist said Kier, of his own free will endeavored to resell said horses at such a sum of money as would save him harmless; that during the time he so held said horses he sold a number thereof to persons to the intervenor now unknown and received the proceeds of such sale or sales in cash, and that thereafter and on the — day of October, 1887, said Rader turned over and delivered the portion of said horses then remaining to his codefendants herein, who then received and branded the same; that since the date last aforesaid his said codefendants have sold and delivered divers and sundry heads of said horses in number and to persons to intervenor unknown, and have received and likewise divided among themselves the proceeds of such sale or sales in cash to the amount of about $1,500 and upwards.

Admits that said Rader paid said Maddox $3,192.93 and this intervenor the sum of $1,591.57, but as to remaining sums alleged to have been received or paid by him intervenor has not a sufficient knowledge to positively deny, and therefore upon information and belief denies the same.

And for answer to defendants' so-called counter-claim, upon information and belief intervenor denies that said defendants have been put to any expense in or about the care, keep, hearding, or breeding of said horses and mares, or that they have paid the sum of $824.36 or any sum whatever on account thereof.

Wherefore intervenor prays judgment as in his complaint he asks for.

CARPENTER, BUCK & HUNT,
49 *Attorneys for Intervenor, William Gaddis.*

TERRITORY OF MONTANA, } ss:
County of Meagher, }

William Gaddis, being duly sworn, deposes and says: I am the intervenor in the above-entitled action. I have read the foregoing replication in the above-entitled action and know the contents thereof, and the same is true of my own knowledge except as to those matters which are therein stated upon information and belief, and as to those matters I believe it to be true.

Subscribed and sworn to before me this — day of September, 1888.

——.

And thereafter and on the 21st day of September, 1888, the said cause coming on regularly for trial to a jury upon said day, that being one of the days of the September term, 1888, of the said court, and the said defendants, having the opening of said case, to support the issues on their part introduced as a witness in his own behalf William Rader, who testified substantially as follows, to wit:

Testimony of William Rader.

Am now and was in August and September, 1887, sheriff of Meagher county; know all the parties to this action and N.
50 B. Smith. I received from N. B. Smith, as attorney of Maddox, a chattel mortgage on Kinyon's horses for foreclosure. The endorsement on it in Smith's handwriting was as follows:

"To the sheriff of Meagher jounty, Territory of Montana:

You are hereby authorized to execute the power of sale contained in certain chattel mortgage, of which the within is a true copy.

FLETCHER MADDOX & WILLIAM GADDIS,
By N. B. SMITH, *Their Agent and Attorney.*"

I received the mortgage and gathered the horses. Smith told me to hurry up and get possession of the horses before Kinyon got back from Helena. I believe Maddox was present at this one conversa-

tion. Maddox was the one that told me to hurry up. Sale began at Collins' corral August 29th, 1887, and lasted five or six days. C. C. Ray was auctioneer. A. B. Kier bid for some of the horses the first day, I think. He bought some the first and about $1,100 worth the second day, and on the morning of the 3rd day I said to him, "How much money have you got altogether?" Smith was present then. He said that he had two thousand dollars in the bank, but when I came to find out he had only $1,752 and some odd cents I told him he had about bought that amount of horses and he had better see about getting more money if he wanted more horses. He stated that the bank was going to loan him money to the extent of fifty per cent. upon the horses bid in by him. I said that fifty per cent. would not buy many more horses, and he went
51 on to say he could get all the money he wanted. I said, "You can go and see Smith," and we all went to the fence and had a talk. Ray, Kier, Waterman, and myself were there and Smith said "to go on with the sale." I stated the case to him—that he had money in the bank and proposed to put up the money and the horses as a forfeit. The sale then went on and Kier bought more horses. Kier said he could raise the money in five days. The whole talk was that the money and horses were to be held as a forfeit for five days and I, as sheriff, was to hold them. Waterman bid for Kier on the 4th day. Smith was present. Smith asked me what Waterman was going to do. I told him I understood he was acting for Kier. I held the horses bid in by Kier for over a month. The next day after the five days were up I told Smith that the horses had not been paid for. Smith said that he did not have anything to do with it and did not want the horses; that he wanted the money due on the mortgage. I tendered him the horses and the money that Kier had paid. He declined to take the horses or the money. On September 11th there was a notice of tender served upon Mr. Smith. I afterwards offered the Kier horses for sale in the "Rocky Mountain Husbandman." I did not sell them at the advertised time, however. I afterwards sold twenty head of horses to Delorimer for one thousand dollars; one to Parberry for $75; one to Dr. McKay for $125, and one to Southy for $75. I turned back all the horses that had not been put up at auction to Kinyon on receiving from him Parberry's check for $2,400 and some odd
52 dollars; this was the amount due on the mortgage over and above the amount of all the bids received at the sale. Expenses of sale and attorney's fee amounted to about $1,300; paid Smith $515.65 as attorney's fee.

Cross-examination:

Never recollect of having but the one conversation with Mr. Maddox before the sale. Neither Maddox nor Gaddis were present when the sale was going on. I think I directed Ray to stop the sale on the morning of the 4th day. This conversation I speak of with Smith was had some time in the forenoon of the third day of the sale. On the 3rd day I went into the bank to find out the amount of money Kier had. On the morning of the third day Kier told me about

having the money in the bank, and it was right after that I stopped the sale and spoke to Smith. When I first objected to Kier's bidding, it seems to me, he had bought a horse or two more than the amount of money he had in the bank. That was when I first stopped the sale and had the conversation with Smith. I computed this five days' credit from the close of the sale. I did not sell any after Monday morning when Kinyon came in and redeemed the balance of the horses unsold. I talked to Smith first about the Englishman getting the money in five days one the day when the sale finally closed; don't think the five days' credit was spoken of at all in the conversation on the third day of the sale. I tendered the property to Smith first on Thirsday, the 11th day of September, 1887. I think on the 11th I tendered him that written notice. I think I sold the 20 head of horses to Delorimer some time in October. I turned the horses over to the bondsmen in White Sulphur Springs; the balance of the Kier horses remained unsold. I
53 delivered the horses to Mr. Anderson for all the bondsmen. I think I delivered the bondsmen 142 head. I had sold the Delormier horses out of the bunch before and do not recollect the exact number I turned over. I think this is the advertisement of sale that I put in "The Husbandman."

I believe I had some talk with Smith about turning the horses over to Kinyon and settling with him before I did so.

Testimony of Max Waterman.

The defendants also introduced as a witness in their behalf and had sworn one MAX WATERMAN, who testified:

I am an attorney practicing at White Sulphur Springs and acquainted with the parties to this action; knew A. B. Kier. I was present at the sale of certain chattel mortgage property on the first day of the sale, Monday, August 29th, 1887, and up to noon of the second day. I represented Mr. Kinyon during first part of sale, but after morning of 4th day of sale, Thursday, from that time on I represented Mr. Kier. I bought for Kier about 40-odd horses altogether. I do not think any of the horses were sold on the 4th day. They were branding in the forenoon, and about noon it rained and sale was adjourned. On Friday, I think, I purchased 19 head, of the value of about $1,600. My purchases were put down by Pyle in a book. N. B. Smith was representing the mortgagees. I had a conversation with Mr. Smith on the morning of the fourth
54 day of sale. I stated that I had a written appointment from Kier to bid on the stock. I showed it to Rader and he said he would not allow Kier to bid on any more stock. There were

conditions attached to my bidding at the sale. I made a statement like this: That Kier would allow the money that he had already paid to Rader, which was $1,752, to be retained by Rader and the stock that had already been bid off until Kier could pay the balance of the purchase-money. At the time this conversation was had I think Kier had started for Helena. I said he would be back in five days and if he did not raise the money the stock and the money already paid in should become forfeited. Smith said "it was all right; you can go ahead with the sale." We had a good deal of other conversation about it, talking over whether or not the 1,752 dollars would cover any discrepancy between the first purchase and the purchase price if the horses had to be resold, and we concluded that it would be ample to cover any extra expense.

Cross-examination:

I know of but the one conversation and that was with Mr. Smith on the 4th day of the sale; that was the first day I was doing any bidding there; that was between 8 and 9 in the morning. I said that Kier would allow Rader to keep the money already paid, also the horses, and that he would raise the balance of the money in five days; that was five days from that time.

Testimony of C. C. Ray.

The defendants also introduced and had sworn one C. C.
55 RAY, who testified:

I was at White Sulphur Springs, in Montana, in the month of August and September, 1887. I was auctioneer at the sale in question. On the first day of the sale Rader asked Smith, as well as I remember, what horses we had better sell first, and, I think, they sold some cheap horses that afternoon, or rather in the forenoon, at the corral. I know Kier. He was at the sale and was stopped from bidding by Rader. After he made a statement to the sheriff on the morning of the second day, the sheriff, myself, and Kier went over to see Smith, and Kier said that he had some money in the bank and wished to buy several thousand dollars' worth of horses and wanted to know if he could do so by turning over that money and giving the sheriff charge of it and he could get more money when he went to Helena. Smith said, "Go on and sell the horses." That was on the morning of the second day. He told the sheriff to go on with the sale. On the 4th morning of the sale the sheriff said to Smith that Kier wanted Waterman to buy more horses, and he, Kier, would go to Helena for the money, and Smith said, "Go on with the sale." Mr. Waterman made some statement there at that time, but I do not remember it now.

Cross-examination:

After the statement had been made to Smith the latter said, "Go on with the sale."

Defendants also introduced one G. R. WILSON, who testified as follows:

56 I was present at the chattel mortgage sale in 1887. I was there on Wednesday and the morning of the 4th day, Thursday; Smith, Rader, Waterman were present; on the morning of the 3rd Rader came around and asked Mr. Smith what we would do about going on with the sale; Smith studied a few moments and talked about this $2,000 forfeit if Kier could not raise the money; I did not hear anything about how long Kier was to have to raise the money; Rader came around and asked if he could go on with the sale and I spoke up and said I thought the $2,000 would make the sale good, and Smith then told Rader to go on with the sale; I do not remember the exact words, but that was the substance; the conversation I refer to was had on Wednesday morning between 10 and 11 o'clock; I heard no other conversation.

No cross-examination.

Testimony of John Wilson.

Defendants also introduced one JOHN WILSON, a witness of lawful age, who, being duly sworn, testified as follows:

My name is John Wilson; I reside at White Sulphur Springs; I was at the sale of horses under chattel mortgage from Monday until the Saturday; I remember the conversations between Smith and Rader—one on Wednesday and one on Thursday; Rader stopped the sale of the horses and Kier, Smith, Rader, and others went over into the corral and I was inside the small corral, about 10 or 15 feet from them; Kier told Smith and Rader that he had $2,000 in the bank; that he wanted to buy more horses and could get
57 the money in Helena or Three Forks and asked that Waterman bid them in for him and they could hold the $2,000 and the horses until he had time to get the money; Smith then told Rader to go on with the sale; the second conversation I heard was on the morning of the 4th day of the sale; Waterman got up to bid on the horses and Rader refused to sell them to him or to take his bids, and then they had quite an argument, and at last Smith agreed to let them go oon with the sale.

And the said defendants, having withdrawn from the consideration of the jury the counter-claim or sett-off set up in their answer herein, rested.

And the counsel for defendant- in open court stated that they had no proof to offer and did not expect to prove any kind or character of special authority in N. B. Smith, and relied solely upon his general authority as attorney by virtue of the mortgage having been placed in his hands for foreclosure.

And the foregoing was all the testimony introduced by either party on the trial of said cause. Thereupon the counsel for the plaintiff moved the court to strike out and withdraw from the jury

all of the testimony of the defendants relative to the directions given by the attorney for the mortgagees at said foreclosure sale, which motion, after argument of counsel, was granted by the court, and to which ruling of the court defendants then and there duly excepted as follows:

Defendants' Bill of Exceptions.

58 Be it remembered that on the trial of the above-entitled cause to a jury, on the 24th day of September, A. D. 1888, that being one of the days of the September, 1888, term of said district court, the defendants, to maintain the issues of their part, and after having proved that the defendant Rader received a copy of the mortgage mentioned and set forth in the complaint herein, having an authority endorsed thereon, an authority to seize and sell said property, which authority is in the words and figures following, to wit:

"To the sheriff of Meagher county, Montana Territory:

You are hereby authorized to execute the power of sale contained in certain chattel mortgage, of which the within is a true copy.

FLETCHER MADDOX,
WILLIAM GADDIS,
By N. B. SMITH,
Their Agent and Attorney."

That said N. B. Smith as such attorney was present at the sale of the property mentioned and described in said mortgage and represented the plaintiffs thereat as their attorney; that at said sale one A. B. Kier was a bidder; that the defendant Rader refused, after said Kier had bid on several horses which had been knocked down to him, to receive his, Kier's, bids any further at said sale; and on the trial aforesaid the said defendants introduced and had sworn the said defendant William Rader, Max Waterman, C. C. Ray, G. R.

59 Wilson, and John Wilson, who each and all testified that they were present at said sale; that after the said defendant Rader had refused to accept the bids of said Kier there was a conversation held between said parties and said Smith in which it was proposed by and on behalf of said Kier that he, Kier, would depos-t with the defendant Rader the sum of money he then had in bank, to wit, the sum of seventeen hundred and fifty-two dollars, and that he would also leave in possession of said Rader all horses then knocked down to him and all purchases he might thereafter make, and if within five days thereafter he did not pay for all of the horses so purchased by him the said money and horses were to become forfeited by him; that thereupon and at said conversation and after the above statement had been made to Smith he directed the said defendant Rader to continue said sale and receive the bids of said Kier. It further appeared in evidence that thereafter the defendant Rader received said sum of $1,752, and also retained in his possession the horses theretofore and thereafter knocked down to

said Kier; that said sum of seventeen hundred and fifty-two dollars constituted a part of the money paid to plaintiffs, as in the pleadings herein alleged.

And thereupon and after the defendants had rested the plaintiffs moved the court to strike out and exclude from the jury all testimony relating to the conversation had with said Smith in the presence of the witnesses above named and all evidence with reference to the instructions given by said Smith to said Rader to continue said sale and to receive the bids of Kier thereat; which said motion is in the words following, to wit:

60 (Title and Caption.)

"Now comes the plaintiff Maddox and moves the court to strike out from the testimony in this case all evidence of conversations of Mr. Smith tending to show a direction by him to sell for credit, or to support the contract pleaded in the answer as having taken place between Kier and the mortgagees."

And, the said motion coming on to be heard, after argument of counsel the court sustained said motion and ordered said testimony to be stricken out and withdrawn from the jury; to which said ruling of the court and to the striking out of said testimony and withdrawing the same from the jury the defendants then and there duly excepted, and pray that this their bill of exceptions may be signed, sealed, and made a part of the record, which is done accordingly this 24th day of September, A. D. 1888.

THOS. C. BACH, *Judge.*

And thereafter and without any introduction of testimony on the part of said plaintiffs and said intervenor the court withdrew said cause from the jury and rendered judgment as follows, to wit:

Be it remembered that this cause having come regularly on for trial before the court and jury, on the 22nd day of September, 1888, the same being a regular day of the term of said court for September, 1888, the plaintiff, Fletcher Maddox, being present by his counsel, N. B. Smith, Carter & Clayberg, and Wade, Toole & Wallace, the intervening plaintiff being present by his counsel,
61 Carpenter, Buck and Hunt, and the defendants above named being present each and all by their counsel, H. G. McIntire and Sanders, Cullen & Sanders and Max Waterman, and witnesses having been regularly called and sworn and given their testimony before the jury in court on behalf of said defendants, who voluntarily assume the burden of proof and admitted all the material allegations of the complaint of the plaintiff Maddox and the intervening plaintiff, William Gaddis, and the defendants having on the 24th day of September, 1888, rested their cause and ceased the further introduction of evidence, and all of the evidence relating to the agreement alleged and pleaded in defendants' answers between the mortgagees and one A. B. Kier having been and upon motion of plaintiff and intervening plaintiff stricken out, and the court having upon motion thereupon ordered judgment and findings for

the plaintiff, and it appearing to the court from all of the evidence in said cause that each and all of the allegations of the complaint and complaint of intervention are true, and that the affirmative allegations of defendants' respective answers by way of defense are wholly unsupported by evidence and unproven, and the defendants, by their attorneys, in open court dismissed the counterclaims in said answer pleaded, and it therefore appearing to the court that all of the defendants, as firms and individuals, executed the official bond of Sheriff Wm. Rader, defendant, conditioned as required by law for the faithful performance of the duties of his office for its term of two years succeeding December 20th, 1886; that the mortgage referred to in the complaint, regular in form, was
62 duly delivered to said Rader, as sheriff, for sale and application of the proceeds of property embraced therein, according to law, by him received, the property duly advertised, and its sale commenced on August 29th, 1887; that said Rader, sheriff, at such sale and at his own risk received credit bids of one A. B. Kier to the amount of $8,096, and that the total sales at said sale of cash and the said credit sales amounted to the $10,735.00, and that on the fifth day of September, 1887, said sheriff, Rader, of his own account and responsibility, released to the mortgagor, one Kinyon, a large number of the mortgaged horses then unsold upon the payment to him of $2,459.20, which said sum so paid to and received by said Rader when added to the amount of $10,735.00 equalled the amount of all expenses, commissions, fees, and disbursements of said sale, the total sum, principal and interest, due upon the mortgage indebtedness; that there was, on said date last aforesaid, due plaintiff Maddox upon the said mortgage and his note secured thereby the sum of $8,187, and due upon a like note to the intervening plaintiff, Gaddis, the sum of $3,518.75; that on September 15th, 1887, said Rader paid said Maddox $2,872.31, and that there remained a balance then due him on account of said note from said Rader $5,314.69, and likewise on said last-named date the said Gaddis the sum of $1,591.57, leaving a balance then due said Gaddis of $1,927.18, no part of which said respective sums had been paid by said Rader to said plaintiff or intervening plaintiff, and which said sums, though payment thereof was on September 17th, 1887, of said Rader duly demanded, he then and ever
63 since, in violation of his duty as sheriff and contrary to the conditions of his said bond, has refused and still does refuse to pay; that there is now due to said plaintiff, Maddox, from said Rader, sheriff aforesaid, the sum of $5,846.16, and that there is now due to the intervening plaintiff from said Rader, sheriff, the sum of $2,119.89, and that the said bond, so executed by the said defendants, is in the penal sum of five thousand dollars, and that the said amount became due and owing to the said plaintiffs and said intervening plaintiff on the 17th day of September, 1887, and that said plaintiff, Maddox, is entitled to a proportion of the amount now due upon said bond of $\frac{7\,3}{1\,0\,3}$ parts thereof, and that said intervening plaintiff, Gaddis, is entitled to a proportion of the amount due on said bond, equal to $\frac{3\,0}{1\,0\,3}$ parts thereof:

Now, therefore, it is hereby ordered, adjudged, and decreed that said plaintiff, Fletcher Maddox, do have and recover judgment against the said William Rader in the sum of one thousand nine hundred and forty-nine and $\frac{98}{100}$ dollars ($1,949.98) and against the said Rader and his codefendants and each and all of them in the further sum of thirty-eight hundred and ninety-eight and $\frac{18}{100}$ dollars ($3,898.18), and that said interve-ing plaintiff do have and recover judgment against the said defendant, William Rader, in the sum of ($518.07) five hundred and eighteen and $\frac{7}{100}$ dollars and against the said Rader and his codefendants and each and all of them in the further sum of sixte-n hundred and one and $\frac{82}{100}$ dollars ($1,601.82), and that said plaintiff, Maddox, and intervening
64 plaintiff, Gaddis, do have and recover of each and all of said defendants their costs and disbursements in the said action expended herein, taxed at $—, and they have and each of them do have execution therefor as by law provided.

Signed and passed in open court this 24th day of September, A. D. 1888. THOS. C. BACH, *Judge.*

The defendants assign for the particular grounds of error upon which they will rely upon their said appeal is as follows, to wit:

I. That as against the bondsmen herein the said complaint does not state facts sufficient to constitute a cause of action.

II. That there is a defect or misjoinder of parties plaintiff in this, to wit, that the said bond appears to have been executed to the Territory of Montana; that the same is a common-law bond and there is no assignment thereof or of any interest therein to the plaintiffs or either of them in this action.

III. That there was a misjoinder of parties defendant in that the said defendants were sued jointly with their said codefendant, William Rader, upon a cause of action arising against said William Rader only.

IV. That two or more causes of action have been improperly united in said complaint in that the cause of action arising against the said William Rader upon which he was solely liable has
65 been or is attempted to be united with a cause of action arising against these defendants upon the obligation set forth in the complaint, and that the court erred in overruling the demurrer to said complaint.

V. That the court erred in striking out the testimony of the defendants all evidence relating to instruction given by N. B. Smith, attorney for the plaintiff, and the intervenor on the trial of said cause.

VI. That the court erred in giving judgment for the plaintiff and withdrawing the said cause from the jury and rendering judgment thereon without any testimony in behalf of the plaintiffs.

VII. That the court erred in rendering judgment as against the sureties on said official bond for a sum greater than the penal sum of said bond.

SANDERS, CULLEN & SANDERS,
Attorneys for Defendants.

The foregoing proposed statement on appeal as amended is hereby allowed as correct.

THOS. C. BACH, *Judge.*

Dec. 27th, 1888.

66 Thereafter, on the 7th day of January, A. D. 1889, the defendants filed their notice of appeal as follows:

Notice of Appeal.

"Title of Cause."

"You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment therein made and entered in the said district court on the twenty-fourth day of September, A. D. 1888, in favor of the plaintiff and intervenor in said action and against said defendants and from the whole thereof.

Dated this 3rd day of January, A. D. 1889.

Yours, etc.,

MAX WATERMAN AND
SANDERS, CULLEN & SANDERS,
Attorneys for Defendants.

To the clerk of the said district court and Messrs. Wade, Toole & Wallace and Messrs. Carpenter, Buck & Hunt, attorneys for plaintiff and intervenor."

"Service of the within notice of appeal accepted this 3rd day of January, A. D. 1889.

WADE, TOOLE & WALLACE,
Att'ys for Plaintiff.
CARPENTER, BUCK & HUNT,
Att'ys for Intervening Pl't'ff, Wm. Gaddis.

I hereby accept service of the within notice this 7th day of January, A. D. 1889.

67 W. M. COCKRILL, *Clerk,*
By BEN. D. GARDNER,
Deputy Clerk."

Thereafter, on the 8th day of January, A. D. 1889, the defendants filed their undertaking as follows:

"*Undertaking.*"

"Title of Cause."

Whereas the defendants in the above-entitled action have appealed to the supreme court of the Territory of Montana from a judgment made and entered against them in said action in the said district court in favor of the plaintiff and intervenor in said action on the 24th day of September, A. D. 1888, for five thousand

five hundred and — dollars, costs of suit, and from the whole thereof:

Now, therefore, in consideration of the premises and of such appeal we, the undersigned, residents of the county of Meagher and Territory of Montana, do hereby jointly and severally undertake and promise on the part of the said appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal or a dismissal thereof not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound; and

Whereas the said appellants are desirous of staying execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of eleven thousand five hundred
68 dollars, in lawful money of the United States (being double the amount named in said judgment), that if the said judgment appealed or any part thereof be affirmed or the appeal be dismissed the appellants will pay the amount directed to be paid by said judgment or the part of such amount as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants on the appeal.

In testimony whereof we have hereunto subscribed our names this 8th day of January, 1889.

WILLIAM GORDON.
GEO. A. IRWIN.

TERRITORY OF MONTANA, } ss:
County of Meagher, }

William Gordon and George A. Irwin, being first duly sworn, each for himself says that he is one of the sureties to the foregoing undertaking; that he is worth the amount specified in the foregoing undertaking over and above all his just debts and liabilities exclusive of property exempt from execution in the Territory of Montana.

(Signed) WILLIAM GORDON.
GEO. A. IRWIN.

Subscribed and sworn to before me this 8th day of January, 1889.

[SEAL.] BEN. D. GARDNER,
Deputy Clerk of Courts, Fourth Judicial District, Montana Territory, in and for Meagher County.

69 In the District Court of the Fourth Judicial District of the Territory of Montana in and for the County of Meagher.

FLETCHER MADDOX, Plaintiff; WILLIAM GADDIS, Intervenor,
vs.
WILLIAM RADER, Sheriff; ALMON SPENCER, CHARLES MAYN, and Louis Heitman, Copartners under the Firm Name of Spencer, Mayn & Heitman; Elmer J. Anderson, James T. Anderson, and J. L. Dilworth, Copartners under the Firm Name of Anderson Bros. & Co.; George F. Danzer, P. H. Maloney, and William Luppold, Defendants.

TERRITORY OF MONTANA, }
County of Meagher. }

I, W. M. Cockrill, clerk of the fourth judicial district court of the Territory of Montana in and for the county of Meagher, do hereby certify the for-going to be a full, true, and correct transcript on appeal of the record in the above-entitled cause.

Witness my hand and the seal of said court hereto affixed this 2nd day of March, A. D. 1889.

[SEAL.]

W. M. COCKRILL, *Clerk*,
By BEN. D. GARDNER,
Deputy Clerk.

69*a* In the District Court of the Fourth Judicial District of the Territory of Montana in and for the County of Meagher.

FLETCHER MADDOX, Plaintiff,
vs.
WILLIAM RADER *et al.*
} Pl'tff's Bill of Excep. 1.

Be it remembered that the plaintiff having on September 19th, 1888, filed his motion to strike off from the files in said cause the complaint of intervention therein filed by William Gaddis, due notice thereof having been given, and said motion having come on to be heard before the court aforesaid on September 20th, 1888, and being then and there heard by the court; which said motion was in the words and figures as follows, to wit:

(Title of Court.) (Title of Cause.)

Now comes the plaintiff, Fletcher Maddox, and files herewith his certain motion, wherein he moves the court to strike from the files in said cause that certain pleading therein filed as a complaint of intervention by one William Gaddis through his attorneys, Carpenter, Buck & Hunt, on the 7th day of April, 1888, for that:

1. Said pleading does not state facts sufficient to constitute a cause of action in favor of said Gaddis.

69*b* 2. Said complaint of intervention does not show any right on the part of said Gaddis to intervene in said action.

3. It does not show that said Gaddis has any interest in the matter of litigation, in the success of either of the parties, or any interest against both.

4. It shows that the debts of Maddox and Gaddis were separate notes, and that their only joint interest was in the security for the payment of these separate and individual notes.

5. This actiin is for misconduct of sheriff in failing to pay plaintiff's note. If he also failed to pay Gaddis this was a separate tort, for which Gaddis had a separate right of action, but no interest whatever in wrong done plaintiff.

(Sig.) N. B. SMITH,
CARTER & CLAYBERG, AND
WADE, TOOLE & WALLACE,
Att'ys for Plaintiff.

(Filed Sept. 19th, 1888.)

Which said motion was then and there by the court overruled; to which said ruling and order of the court plaintiff then and there duly excepted and presented this his bill of exceptions No. 1, settled and passed in open court.

(Sig.) THOS. C. BACH,
Judge of said Court.

(Filed Sept. 20th, 1888.)

69c In the District Court of the Fourth Judicial District of the Territory of Montana in and for the County of Meagher.

FLETCHER MADDOX, Plaintiff,
vs.
WILLIAM RADER *et al.*, Defendants.

Be it remembered that on the — day of March, 1888, among others, the following proceedings were had and done in the above-entitled action: One William Gaddis filed in said action his certain notice of motion for leave of court to file therein a complaint of intervention; which said notice of motion was in words and figures as follows, to wit:

(Title of Court. Title of Cause.)

Please take notice that in behalf of William Gaddis we shall move the -bove-entitled court for leave to intervene in the above-entitled cause of action and to file a complaint therein, motion to intervene to be based upon the complaint and records on file in the said above-entitled cause.

(Sig.) CARPENTER, BUCK & HUNT,
Att'ys for William Gaddis.

Helena, March 29th, 1888.

To Messrs. Carter, Clayberg & Maddox, Wade, Toole & Wallace, att'ys for plaintiff; Messrs. Sanders, Cullen & Sanders, att'ys for defendant.

69*d* Service of the within notice of motion accepted this 29th day of March, 1888.

(Sig.) WADE, TOOLE & WALLACE,
CARTER, CLAYBERG & MADDOX,
Att'ys for Plaintiff.
SANDERS, CULLEN & SANDERS,
Att'ys for All the Def'ts Except Wm. Rader.

And thereafter and on the — day of April, 1888, William Gaddis filed his motion for leave to intervene; which said motion is in words and figures as follows, to wit:

(Title of Court.) (Title of Cause.)

Now comes William Gaddis, who moves this court to be allowed to intervene in the said above-entitled cause of action and to file a complaint therein. This motion is based upon the records and files of this court in said above-entitled action and upon complaint which said William Gaddis asks leave to file.

(Sig.) CARPENTER, BUCK & HUNT,
Att'ys for William Gaddis.

And on the 2nd day of April, 1888, said motion coming on regularly to be heard by the court and being resisted by plaintiff, the same was duly argued, heard, and granted; to which ruling of the court the plaintiff, Fletcher Maddox, by his counsel, then and there and at the time duly excepted, as well as to the filing of said complaint, and presents herewith this his bill of exceptions therefor, which is this day signed and passed in open court.

(Sig.) THOS. C. BACH,
Judge of said Court.

69*e* Dated April 7th, 1888.
Filed April 7th, 1888.

In the District Court of the Fourth Judicial District of the Territory of Montana in and for the County of Meagher.

FLETCHER MADDOX, Plaintiff,
vs.
WILLIAM RADER *et al.*, Defendants; WILLIAM GADDIS, Intervening Pl'tiff. } Pl'tiff's Bill of Exep. No. 2.

Be it remembered that, among other proceedings, the following were had and done upon the trial of said cause: The plaintiff made a motion for judgment against all the defendants and in favor of him, the said plaintiff, in accordance with the prayer of the said complainant; which motion was in words and figures as follows, to wit:

(Title of Court.) (Title of Cause.)

Now comes the plaintiff in the above-entitled cause, by his counsel, and moves the court for judgment in favor of plaintiff, Fletcher

Maddox, upon the evidence and pleadings in the cause against the defendants, Rader, Spencer, Mayn, and Louis Heitman, Anderson Bros. & Co., George F. Danzer, William Luppold, and P. H. Maloney, in accordance with the prayer of plaintiff's complaint. The court, having duly considered the said motion, overruled the same; to which overruling of the said motion the plaintiff then and there took an exception; which said exception was noted in the stenographer's notes.

69*f* And thereupon the intervening plaintiff, William Gaddis, objected to the granting of said motion; whereupon the same was by the court overruled, and the plaintiff Maddox to the said ruling and order of the court then and there duly excepted.

And thereafter the said intervening plaintiff made a motion for a joint judgment in favor of himself and said *said* plaintiff Maddox, in proportion to the amounts due each, respectively, against each and all of said defendants; which said motion was in words and figures as follows, to wit:

(Title of Court.) (Title of Cause.)

Now comes the intervening plaintiff, William Gaddis, and moves the court that judgment be rendered in said action in favor of said intervening plaintiff in common with said plaintiff Maddox against said defendants in proportion to the respective amounts admitted as the amounts due to said Maddox and Gaddis, respectively, under the pleadings in said cause in accordance with the prayer of intervenor's complaint.

(Sig.) CARPENTER, BUCK & HUNT,
Att'y for Intervenor, William Gaddis.

To which said motion the plaintiff then and there objected for the reason that said intervenor Gaddis disclosed by his petition no right of intervention nor any right to share in any manner whatsoever in plaintiff's recovery upon said bond or in said action; which said objection was by the court overruled and said motion granted and judgment ordered in accordance therewith; to which said

69*g* ruling and order of the court the plaintiff Maddox then and there duly excepted and presents this his bill of exceptions No. 2 upon the foregoing, which is herewith and at the time signed and passed in open court this 24th day of Sept., 1888.

(Sig.) THOS. C. BACH,
Judge of said Court.

(Filed Sept. 24th, 1888.)

70 & 71 In the Supreme Court of the Territory of Montana, July Term, A. D. 1889.

FLETCHER MADDOX, Respondent, and WILLIAM GADDIS, Intervenor,
vs.
WILLIAM RADER *et al.*, Appellants.

Opinion of the Court.

BLAKE, *C. J.*:

This action was commenced by the respondent Maddox to recover from the appellants, the sheriff of Meagher Co. and the sureties upon his official bond, the sum of $5,314.69 and interest. Gaddis was allowed to intervene by the order of the court below and demanded judgment against the appellants for the sum of $5,000. It appears from the transcript that the appellants voluntarily assumed the "burden of proof and admitted all the material allegations of the complaint" of Maddox and Gaddis. The following statement of the facts, which are contained in the pleadings, defines clearly the nature of the present inquiry.

William Rader was the sheriff of Meagher county in 1887, and the other appellants executed in 1886 his official bond in the sum of $5,000. The condition is that Rader "shall well, truly, and faithfully perform all official duties now required of him by law and shall truly and faithfully execute and perform all the duties of such office of sheriff required by law to be executed subse-
72 quently to the execution of this bond." Maddox placed in the hands of Rader August 9th, 1887, a chattel mortgage dated July 9th, 1886, and executed by P. D. Kinyon, to secure the payment to Maddox of the sum of $7,313 in one year, with interest, and to Gaddis of the sum of $3,000 in one year, with interest. The property consisted of horses, and the sheriff was directed to take them into his possession and sell the same and apply the proceeds according to the terms of such mortgage. The officer between the ninth and 30th days of August, 1887, took possession of the property and advertised it for sale at public auction, and between the 30th day of August and the fifth day of September, 1887, sold a large portion thereof for the sum of $10,735. On the last-named date the sheriff released and returned the remainder of the horses then unsold to Kinyon upon the payment of a sum of money which was sufficient, when added to the amount of said sales, to satisfy the notes of Maddox and Gaddis, which are set forth in the mortgage, and all costs and disbursements arising from the sale. There was due to Maddox September 5th, 1887, the sum of $8,137.00, and the sheriff paid to him September 15th, 1887, the sum of $2,872.31. Maddox demanded of the sheriff September 17th, 1887, the amount remaining due, $5,314.69, which has not been paid. Copies of the mortgage and bond are made parts of the complaint. The allegations in the pleading of Gaddis show similar facts, so far as the proceedings affect the sheriff.

Rader in his answer denies that he received any other sum
73 than $4,390.65 at the sale and alleges that 142 horses were "bid off and knocked down" to A. B. Kier for the price of $8,069.50 in pursuance of an agreement between Maddox and Gaddis and Kier; that Kier paid thereon the sum of $1,752.15, which is included in said amount of $4,390.65, "and was to have the period of five days in which to pay the balance of said sum of $8,096.50, the said Rader to keep and retain the said horses, mares, and colts until the full payment of said sum of $8,096.50, and in the event of Kier's failure to fully pay said sum the said $1,752.15 to become forfeited to the use of the said mortgagees and said horses, mares, and colts to be retained by said Rader for and on account of said mortgagees and subject to their orders; the said William Rader retained said sum of $1,752.15 and paid the same over to said mortgagees, it being, as aforesaid, a part of said sum of $4,390.65, and retained in his custody said one hundred and forty-two horses, mares, and colts subject to the order of the said mortgagees; that afterwards, to wit, on the — day of September, A. D. 1887, the said Rader notified the said mortgagees of Kier's failure to pay the balance of said sum of $8,096 50 and notified them that said horses, mares, and colts were then and there held by him subject to their orders, and afterwards, to wit, on the — day of September, 1887, on said mortgagees failing to direct what disposition he should make of the same, the said Rader tendered said horses, mares, and colts to said mortgagees, which they then and there refused to receive, and that said Rader, ever since last-mentioned
74 date, has had and now has said horses, mares, and colts in his possession subject to the order and disposal of said mortgagees; that on, to wit, the 5th day of September, A. D. 1887, P. D. Kinyon, the mortgagor in said mortgage mentioned, tendered and paid to the said Rader the sum of $2,459.20, that being the balance due on said mortgage at that time, and demanded the return to him of the property then unsold, which was then held by the said Rader, and that thereupon the said Rader returned to the said Kinyon such unsold property and paid over to the said mortgagees the said sum of $2,459.20.

That the total money so as aforesaid by said Rader received was the sum of $6,849.85; that the costs, disbursements, and expenses in and about said mortgaged sale were the sum of $1,445 35, which were paid off and discharged by said Rader, and that said Rader, for and on account of said chattel mortgage, has paid to Fletcher Maddox, mortgagee, the sum of $3,192.93 and to William Gaddis, mortgagee, the sum of $1,591.57.

That the foregoing constitute the acts and facts complained of by plaintiff herein."

The same answer was filed to the complaint of Gaddis. The replications deny that any agreement was entered into with Kier or the sheriff through the instructions of the mortgagees which control-ed the sale or disposition of the property. The testimony which was introduced at the trial on behalf of the sheriff and his sureties was

excluded and judgment was rendered by the court for Maddox and Gaddis.

75 The laws of the Territory provide that "it shall be lawful for the mortgagor of goods, chattels, or personal property to insert in his mortgage a clause authorising the sheriff of the county in which such property or any part thereof may be to execute the power of sale therein granted to the mora*g*agee, his legal representative and assigns, in which case the sheriff of such county, at the time of such sale, may advertise and sell the mortgaged property in the manner provided in such mortgage." Comp. Stats., 5th div., sect. 1550. The next section is as follows: "The sheriff making a sale of mortgaged property, as in the foregoing section provided, shall be entitled to receive as his compensation the same fees as upon sales of personal property on execution." Comp. Stat., 5th div., sect. 1551.

The chapter governing sheriffs prescribes that "the *the* condition of such bond shall be in substance as follows: * * * That if the said — shall well and faithfully perform and execute the duties of the office of sheriff of said county of — during the continuance in office by virtue of said election without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as sheriff and shall deliver to his successor all writs, papers, and the things pertaining to his office which may be so required by law." Comp. Stat., 5th div., sect. 850.

76 It will be observed that the language of the bond of Rader does not follow the words of the statute. The appellants contend and it is conceded that the liability of the sureties cannot be extended by implication and that they are entitled to stand upon the terms of their written contract. It is further claimed that the omission of a condition respecting the paying over of moneys that may come into the hands of the sheriff and the failure of the act relating to chattel mortgages to provide therefor relieve the sureties from all responsibility in this action. Rader accepted the trust that was tendered to him by the mortgagees, and, by virtue of the statute and instrument conferring the authority upon him, took possession of the property and admits that he received certain sums of money from the sales which have been mentioned. We are of the opinion that this court in Vose *vs.* Whitney, 7th Mont., 393, decided some of these questions, and Mr. Justice McLeary, in construing this law, says: "Under the statute the sheriff took possession of these cattle in his official capacity and not solely as the agent of either the mortgagee or the mortgagor. He is an executive officer appointed by the law to make the sale of the mortgaged property in compliance with the terms of the mortgage itself. * * * But, inasmuch as he acted under the requirements of the law, he must be held to have been performing an official duty."

Let us, then, gather from the terms of the mortgage the obligations that were voluntarily assumed by Rader at the request of the mortgagees. This instrument empowers the sheriff to sell the property

77 "in the manner proscribed by law, and out of the money arising from such sale to retain the said principal and in-

terest, together with the costs and charges of making such sale, together with an attorney's commission of five per cent., and the overplus, if any there be, shall be paid by the party making such sale on demand" to Kinyon. It is a presumption of law that the bond of Rader was executed in contemplation of the statute defining the duties of the sheriff in making sales authorized by chattel mortgages. Territory *vs.* Carson, 7 Mont., 425. The obligation to account for and pay over money which may have been received by the officer in the discharge of his public trust is clearly included within the performance of the conditions that were undertaken by the sureties. It was the duty of Rader to comply faithfully with the provisions of the mortgage concerning the payment of the money which he obtained from the sale of the property of Kinyon.

This action has been properly commenced against the principal and his sureties who executed the bond that Rader would perform "all official duties."

Does the evidence tend to prove that the foregoing agreements were made at the time of the sale by the officer between Kier and the mortgagees? Maddox and Gaddis were not present, and N. B. Smith, Esq., acted and was consulted as their attorney. The appellants insist that Rader accepted the bids of Kier under the contract which was entered into by Smith in behalf of the respondents. A material admission appears in the transcript, as follows: "And the counsel for defendant- in open court stated that they had no proof to offer and did not expect to prove any kind or character of special authority in N. B. Smith, and relied solely upon his general
78 authority by virtue of the mortgage having been placed in his hands for foreclosure."

The authorities are harmonious in supporting the proposition that an attorney-at-law has no right to receive anything except money in payment of a debt which has been entrusted to him for collection without express direction from his client. 2 Greenl'f Ev., sect. 141, and cases cited; Stackhouse *vs.* O'Hara, 14 Penn. State, 88; Harper *vs.* Harvey, 4 W. Va., 539; Snrock *vs.* Dede, 5 Rand., 639; Jeter *vs.* Haviland, 24 Ga., 252; Miller *vs.* Edmonston, 8 Blackf., 291; Trumball *vs.* Nicholson, 27 Ill., 149; Bailey *vs.* Bagley, 19 La. Ann., 172; Wright *vs.* Daily, 26 Tex., 730; Nolan *vs.* Jackson, 16 Ill., 272.

The respondents did not empower Smith to sell the mortgaged property to any bidder on credit, and are not bound by the action of the sheriff in the arrangements with Kier.

Rader retains, subject to the action of the mortgagees, the horses which were "knocked down" to Kier, and, having treated the bids of Kier as cash, accepted from the mortgagor the sum of $2,459.20 in full satisfaction of the mortgage and delivered to Kinyon the property remaining unsold. It is not pretended that these acts of the officer were authorized by the respondents or their attorney, but the appellants say that they have been satisfied by the receipt of the amounts arising from the transactions, which are referred to in the answer. The mortgagees demanded from Rader the payment

of the principal and interest of the promissory notes made by
79 Kinyon and refused to take property in lieu thereof. They accepted from the sheriff the sums of money which have been specified in partial satisfaction of their claim against the mortgagor. No conditions were annexed to these payments by Rader, and no fact is pleaded or shown which can be deemed a ratification of his conduct by the respondents.

By a stipulation of the parties the court heard upon this appeal the arguments of Maddox and Gaddis upon the right of the latter to intervene in the action. They are interested as mortgagees and hold separate promissory notes, which are payable by Kinyon at the same time and secured by the same property and no priority is recognised in the mortgage. Mr. Jones, in his treaties on Chattel Mortgages, says: "Where a mortgage has been given to secure two notes to different holders, and the mortgagees seek to reduce the property to possession by replevin under a clause giving them this right whenever they should feel themselves insecure, they must sue jointly, as they are joint owners." Section 49 and cases cited; Noyes *vs.* Bainet, 57 N. H., 605. But, while the counsel for Maddox admit that Gaddis could intervene in an action for the foreclosure of this mortgage, they assert that this suit is founded on the official misconduct of Rader, and that their client is the first party who is entitled to exhaust the penalty of the bond. The twenty-fourth section of the Code of Civil Proc. is applicable to this branch of the controversy: "Any person may, before the trial, intervene in an
action or proceeding who has an interest in the matter of
80 litigation in the success of either of the parties or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons either by joining the plaintiff in claiming what is sought by the complaint * * * or by demanding anything adversely to both the plaintiff and defendant and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court. * * *" Mr. Pomeroy reviews the authorities upon the subject and concludes: "The intervenor's interest must be such that if the original action had never been commenced and he had first brought it as the sole plaintiff he would have been entitled to recover in his own name to the extent, at least, of a part of the relief sought." Pomeroy Remedies, sect. 430. If the sheriff had performed his duty and sold the property of Kinyon for cash, the respondents would have been jointly interested in the proceeds. But under the circumstances attending the case their sole remedy is against the appellants, and, in the absence of an agreement of the mortgagor and mortgagees or a statement providing therefor, we do not think that the mere commencement of the action by Maddox secured a prior lien upon the bond of Rader. The court below committed no error in allowing Gaddis to intervene and file his complaint under the provisions of the Code of Civil Procedure. 1, *supra*. Legal interest was computed upon the penalty of the bond of the sheriff from the time the demand was made for the payment of the money, which was found to be due to the re-

spondents, and the appellants remark in passing that this
81 action is erroneous. The case of Jefferson County *vs.* Lineberger, 3 Mont., 246, was brought upon the official bond of a county treasurer to recover a certain amount. This court held that it was the duty of principal and his sureties to pay the sum for which this officer was liable when he was in default, and that upon their failure and refusal so to do the county could institute and action and collect interest under the laws of the Territory. Comp. Stat., 5th div., sect. 1237. The amount of the penalty in the bond sued on does not limit the responsibility of the sureties in this action. 2 Sutherland Dam., 15, note, and cases cited.

It is therefore ordered and adjudged that the judgment be affirmed with costs.

HENRY N. BLAKE, *C. J.*

S. DE WOLFE, *A. J.*

Filed October 5th, 1889.

R. L. WORD, *Clerk.*

82 & 83 In the Supreme Court of the Territory of Montana, July Term, A. D. 1889.

FLETCHER MADDOX, Plaintiff,
vs.
WILLIAM RADER *et al.*, Defendants; WILLIAM GADDIS, Intervenor.

Appeal from the district court of the fourth judicial district in and for the county of Meagher.

For app'l'ts, Sanders, Cullen & Sanders, Max Waterman, H. G. McIntire; for resp., Wade, Toole & Wallace; Carpenter, Buck & Hunt, for intervenor.

Opinion of Liddell, J., Dissenting.

The following undisputed facts appear in this case: P. D. Kinyon borrowed $10,313.00 from William Gaddis and Fletcher Maddox, for which he gave two notes on the 9th of July, 1886, one to Gaddis for $3,000.00 and another to Maddox for $7,313.00, and on the same day executed a chattel mortgage on a herd of horses to secure the payment of the notes and stipulated therein that upon default in the payment the sheriff was empowered to take possession and sell the mortgaged property after 5 days' advertisement either at private or public sale and apply the proceeds to the payment of the mortgage debt. Default having been made, the two creditors placed the mortgage in the hands of their attorney, who delivered it to the sheriff, William Rader, with the following endorsement thereon:

"To the sheriff of Meagher county, Montana Territory: You are
84 hereby authorized to execute the power of sale contained in a certain chattel mortgage, of which within is a true copy. Fletcher Maddox and William Gaddis, by N. B. Smith, their agent and attorney."

Under this order the sheriff took possession of several hundred head of horses and advertised them for sale on the 30th of August, 1887.

At this sale, which was attended by the creditors' attorney, a man by the name of Kier bid off about $1,100.00 worth of horses, when the sheriff refused to cry his bids any longer. Kier replied that he wished to purchase to the extent of several thousand dollars; that he had $2,000.00 in bank, which he would place in the hands of the sheriff, and also leave any stock which he might purchase in the sheriff's possession until he should pay the balance of the purchase-money, which he could readily do in five days; if he failed to comply with his bid the money and horses should be forfeited to the mortgagees. The sheriff referred the matter to the mortgagees' attorney, who, after some discussion, directed the sheriff to proceed with the sale, which was accordingly done.

On that occasion Kier continued his bids, and on the day following he was represented by his attorney, one Watterman, who, under a written power from Kier, bid off $1,600.00 worth of horses for him, making his bids reach about $8,096.50.

On inquiry at the bank it was found that Kier did not have more than $1,752.00, but this was turned over to the sheriff on the second day of the sale, which lasted for five days.

85 Mr. Watterman's bids were on the fifth day, and before they were received by the sheriff he displayed his written power, and again the matter was referred to the creditors' attorney, who, upon being shown that the amount of money already in the sheriff's hands was sufficient to cover any loss and expenses from a resale of the property, said to the sheriff, "It is all right and you can go ahead with the sale;" and thereupon Waterman made the purchases referred to.

Kier's purchases in the aggregate amounted to $8,096.50, and thereafter, the mortgagor having paid the difference between the bids of Kier and the debt and costs, the sheriff released the rest of the mortgaged property. The horses purchased by Kier (142 in number) with the $1,752.00 remained in the sheriff's hands.

Kier failed to comply with his bid, and the sheriff, after paying costs and attorneys' fees, apportioned the money in hand between the two creditors—that is, $3,192.93 to Maddox and $1,591.57 to Gaddis—and also tendered the horses, 142 head, to the mortgagees, who received the money, but refused to take the horses, and failed to direct what disposition was to be made of them.

Subsequently the sheriff sold 23 head of horses at private sale for $1,275.00, from which he deducted costs of herding, breeding, and keeping the same, and tenders the balance with the horses if plaintiffs will accept.

Upon this state of facts Maddox instituted suit against the sheriff and his bondsmen, alleging that the sheriff had sold the

86 property for enough to satisfy all claims and that after demand he had failed to pay over the same; wherefore he prayed for a judgment solidarily against both the sheriff and his bondsmen for the balance due him, to wit, $5,314.69, with interest.

As the sheriff's official bond is only for $5,000.00 Gaddis intervened in this suit and praying for a like judgment up to the amount due him, to wit, $1,927.18, and that the sum due and recovered on the official bond might be apportioned between the two mortgagees.

The sheriff and his bondsmen, in whose custody he placed the horses after the refusal of the plaintiff either to accept or direct what disposition should be made of them, answered, setting up all of the foregoing facts, and again tendering the horses and setting forth the sale by the sheriff of some 23 head at $1,275.00, which they also tendered, less the cost of herding, breeding, and keeping, if the creditors will accept. They further aver that the horses are subject to the order and disposal of the creditors.

The demurrer of defendant- to the complaints of plaintiff and intervenor is not well taken. Each states a cause of action, and I entertain no doubt of the liability of the sheriff and his bondsmen for any failure to perform his duties. As the sheriff of the county he could not have refused to execute the power of sale at the request of the creditors, and if he neglected to perform the duties incumbent upon him as sheriff his bondsmen must respond for any damage sustained by either his misfeasance or malfeasance in
87 office, and therefore I think the judge *a quo* correctly overruled the demurrer.

This is a suit against the sheriff for damages in failing to pay over funds, and when Gaddis filed his intervention the plaintiff moved to dismiss the same by striking it from the files as not stating a cause of action, but the judge *a quo* overruled the same, and upon final trial he gave judgment for the full sum prayed for and distributing the amount between the plaintiff and intervenor. There is a bill of exceptions to this ruling taken by the plaintiff, but there is no notice of appeal or bond on his part, and, consequently, we cannot consider the issues between them. Neither plaintiff or intervenor have appealed from the judgment or order, and therefore they are respondents, while the defendants, who are appellants, are not concerned, nor do they complain of the status of the case as between the plaintiff and intervenor.

As between corespondents or appellees there can be no change in a judgment. To have this court review an order or final judgment as between intervenor and plaintiff the matter complained of must be brought before us by an appeal of one or the other. I therefore think the questions raised by the motion to dismiss the intervention cannot be heard in this court.

The facts which I have detailed in support of this opinion were all elic-ted from witnesses upon the trial of this case. They were incontestibly established by the defense and no effort was made — rebut them, but upon motion all the testimony and evidence upon the part of the defendants was stricken from the record,
88 and straightway a judgment was entered against the sheriff and his bondsmen *in solido* and for an amount in excess of the sum for which the sureties had bound themselves.

So far as the seizing creditor is concerned the sheriff is the creature of instructions, and when he had received his authority from

the mortgagees, either personally or through their agent or attorney, he was to obey all instructions concerning the execution of the writs from them or their attorney and which did not conflict with the rights of the defendant-. I assimilate the proceedings to sell the mortgaged property through the sheriff to sales by auctioneers. It is too clear to admit of discussion that the power of a sheriff to sell does not empower him to either sell on credit or upon conditions or contingencies; and it is equally beyond discussion that an attorney-at-law must have express authority to create a debt or to buy property; but as the sheriff in making the sale is under the control of the creditors or their attorney present, I have no doubt but that it was the sheriff's place to receive and cry the bids of Kier when so instructed by the creditors' attorney.

And in view of his employment and profession I do not think that he required any express authority to direct the sheriff to cry what he considered a good bid. The record does not show that there were any other bidders at the sale than Kier; and I conclude from the circumstances that the attorney for the creditors thought that it was advantageous to his clients to allow Kier to bid, for the horses still remained in the hands of the sheriff, and the
89 $1,752.00 deposited with him was considered by the attorney as sufficient to cover the expenses and damages resulting from a resale in case Kier did not comply with his bid or his clients declined to take the horses.

The sheriff is not the guarantor of any one who bids at a sale made by him. If the purchaser declines or fails to comply with his bid, although perfectly solvent, the creditor may have the property resold and demand the difference from the purchaser, or he may continue the sale of the debtor's property.

So we may leave out of view any question of authority to receive the bids made by Kier; the case was one where the purchaser had either neglected or refused to comply with his bid by paying the purchase price. The property was not his until he complied with the terms of the bid; and until he did so it remained the property of the mortgagor. It was not the property of the sheriff, nor did it become that of the creditors because they had repudiated the agreement of their attorney.

It became the duty of the sheriff, acting as the auctioneer of the plaintiff, to notify them of the refusal of the purchaser to comply with his bid, and when he did so and the mortgagees refused to ratify the acts of their attorney by taking the property as their own they should have directed the sheriff to resell it, and if it had failed to bring the original purchase price or enough to satisfy the mortgages they might continue to sell the mortgaged property.

90 It is obvious that they have been in fault in this respect; the horses bid off by Kier do not belong either to them or to the sheriff, but to the mortgage debtor, and the failure of Kier did not obligate the sheriff in any way to pay his bid any more than it would be obligatory on the sheriff to pay the bids of a purchaser at a sheriff's sale under execution. In this respect there is no fraud charged against the sheriff either by the plaintiff or intervenor. If

any one is to blame it is the attorney of the creditors, who, by his repeated directions to the sheriff to proceed with the sale, held himself out as properly empowered by his clients to act in this matter.

His clients might very well decline to become the purchasers of the horses upon the failure of Kier to pay for them, but they cannot escape from the act of their attorney in directing the sheriff to receive Kier's bids. When they did so they should have directed the sheriff to resell the property. The fact that the sheriff released the other mortgaged property after the payment of the difference between Kier's purchase and the amount due did not have the effect of extinguishing the mortgage or Kinyon's liability. It is the latter's obligation to pay the debt, and if the property in the sheriff's hands is not sufficient upon a resale of the same the mortgaged property must pay the balance, and, in default, Kinyon personally.

It is not true that Kier paid the $1,752 to the sheriff to cover the amount of his first bid, but the evidence is precise and explicit that he paid the sum after his conversations and understanding with the plaintiff's attorney present at the sale
91 to cover any damage and expense which might be occasioned should he fail to pay the rest of his bid within five days.

The case of the plaintiff was completely destroyed by the defendants' evidence at the time of the filing of the motion to strike out. The plaintiff sued the sheriff for failure to pay over proceeds arising from the sale, while the evidence shows that all the money received from the sale had been paid over and that the purchaser, Kier, had never complied with his bid, but that the property was still in the sheriff's hands.

The intervenor's case should also fail because of the same facts and the additional fact of the defendants' tender of the property which it is claimed that the sheriff has converted.

After their attorney had refused emphatically to receive the horses, but demanded the cash, it was a vain and useless thing for the sheriff to continue his tender of the property. Tender is only a protection to one who owes a debt, and what the sheriff terms a tender was merely a notice that the property was in his hands subject to the creditors' orders, for he did not owe the debt.

It would be most inequitable to allow the creditors a judgment against the sheriff for the value of horses which he never bought and holds subject to the order or disposition of the mortgagees.

A thorough examination of the record impresses me with the honesty of the sheriff throughout the entire transaction and his constant effort to serve the creditors and collect the debt. The
92 rights of the creditors were never impaired or injured up to the institution of this suit, and the only possible cause of complaint which they ever had was the failure of the sheriff to readvertise the property bid off by Kier. But when I consider that the horses and the money were tendered to the mortgagees and that neither of them nor their attorney requested or directed a resale even this

cause of action falls to the ground. Perhaps upon a resale of this property it might bring enough to pay the debt.

The duty of courts is to do justice between parties, but how could that be done in this instance by giving a judgment against the sheriff? This is a proceeding against him in the nature of damages for failure to do his duty, and if he should satisfy the judgment rendered by the district court he would not own the horses nor would he be subrogated to the rights of the mortgagees.

To my mind it is plain that the sheriff has not neglected any official duty; that he has paid over all the money collected at the sale; that he is not liable for the failure of Kier to pay his bid, and if the plaintiff and intervenor have not collected their debt from Kinyon it is their own fault in not directing the resale of the property purchased by Kier.

I conclude that their is neither law nor equity in the creditors' demands; that the striking out of the defendants' evidence was erroneous and the judgment for plaintiff and intervenor on motion should be reversed, reserving to the plaintiff and intervenor their right to resell the horses bid off by Kier and also their rights
93 against the sheriff for any damages which may accrue to them for his failure to produce the same or account for the proceeds of those horses he may have sold since the sale 5th September, 1887.

For whatever damages the sheriff may occasion by his acts he is responsible personally, but his sureties are only bound to the extent of the amount named in their bond, and therefore the judgment is erroneous in condemning the sureties to pay any sum in excess of $5,000.00, the penalty named in the bond.

For these reasons I dissent from the opinion of the majority of the court in this case.

M. J. LIDDELL, *A. J.*

Filed Oct. 5th, 1889.

R. L. WORD, *Clerk.*

94 In the Supreme Court of the Territory of Montana, July Term, A. D. 1889.

FLETCHER MADDOX, Respondent, and WILLIAM GADDIS, Intervenor, *versus* WILLIAM RADER *et al.*, Appellants.

Judgment of the Court.

This cause came on this day for the decision and judgment of this court on appeal; whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the court below entered in this cause be, and the same is hereby, affirmed with costs.

October 5th, A. D. 1889.

95 *Petition for Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

In Supreme Court.

FLETCHER MADDOX, Plaintiff, and WILLIAM GADDIS, Intervenor, Respondents,
versus
WILLIAM RADER, Sheriff; ALMON SPENCER, CHARLES MAYNE, Louis Heitman, Copartners under the Firm Name of Spencer, Mayn & Heitman; Elmer J. Anderson, James F. Anderson, and J. L. Dilworth, Copartners under the Firm Names of Anderson Bros. & Co.; George F. Danzer, P. H. Maloney, and William Luppold, Appellants.

To the Honorable Henry N. Blake, chief justice of the supreme court, Territory of Montana:

And now comes William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George F. Danzer, P. H. Maloney, and William Luppold, by their attorneys, Cullen and Sanders, and complain that in the record of proceedings and also in the rendition of the judgment in the suit between Fletcher Maddox, plaintiff, and William Gaddis, intervenor, and the above-named William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George F. Danser, P. H. Maloney, and William Luppold, defendants, in the supreme court of the Territory of Montana, being the highest court of law or equity in which a
96 decision could be had in said suit and in which a final judgment was rendered against them on the 5th day of October, 1889, in said suit, and wherein said court erred in that the bondsmen were not liable for the acts of the sheriff in making sale on a chattel mortgage in the complaint herein mentioned, and in that the said plaintiff and intervenor were bound by the agreement shown to have been made between the defendant Rader, as sheriff, and the said plaintiff and intervenor and one Kier, all of which appears in the record and proceedings in said suit, *and* manifest error hath happened, to the great damage of the said William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George F. Danser, P. H. Maloney, and William Luppold.

Wherefore they pray for the allowance of the writ of error and such other process as may cause the same to be corrected by the said Supreme Court of the United States.

CULLEN & SANDERS, *Attorneys.*

Allowed this 22nd day of October, A. D. 1889.

HENRY N. BLAKE,
Chief Justice of the Supreme Court of Montana Territory.

Filed October 22nd, A. D. 1889.

R. L. WORD, *Clerk.*

97 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of Montana Territory, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court, before you, between Fletcher Maddox, plaintiff, and William Gaddis, intervenor, *vs.* William Rader, sheriff; Almon Spencer, Charles Mayne, Louis Heitman, copartners under the firm name of Spencer, Mayne & Heitman; Elmer J. Anderson, James F. Anderson, and J. L. Dilworth, copartners under the firm name of Anderson Bros. & Co.; George F. Danser, P. H. Maloney, and William Luppold, manifest error hath happenned, to the great damage of the said William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George H. Danser, P. H. Maloney, and William Luppold, as by their complaint appears; we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December, in the said Supreme Court to be then
98 and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court, the 22nd day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal Supreme Court, Montana Territory.]

R. L. WORD,
Clerk of the Supreme Court of Montana.

Filed Oct. 22nd, '89.

R. L. WORD, *Clerk.*

99 *Citation.*

UNITED STATES OF AMERICA, *ss:*

FLETCHER MADDOX, Plaintiff, and WILLIAM GADDIS, Intervenor, Appellees,
vs.
WILLIAM RADER, Sheriff; ALMON SPENCER, CHARLES MAYNE, Louis Heitman, Copartners under the Firm Name of Spencer, Mayne & Heitman; Elmer J. Anderson, James F. Anderson, and J. L. Dilworth, Copartners under the Firm Name of Anderson Bros. & Co.; George F. Danser, P. H. Maloney, and William Luppold, Appellants.

To Fletcher Maddox, plaintiff, and William Gaddis, intervenor:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, District of Columbia, on the first Monday of December, A. D. 1889, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein the above-named William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George F. Danser, P. H. Maloney, and William Luppold are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

100 Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

HENRY N. BLAKE,
Chief Justice of the Supreme Court of the Territory of Montana.

Due service of the foregoing citation admitted this 22nd day of October, A. D. 1889.

WADE, TOOLE & WALLACE,
Att'ys for Pl'ff.
CARPENTER, BUCK & HUNT,
Att'ys for Intervenor.

Filed Oct. 22nd, 1889.

R. L. WORD, *Clerk.*

101 *Citation.*

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

FLETCHER MADDOX, Plaintiff, and WILLIAM GADDIS, Intervenor, Respondants,
vs.
WILLIAM RADER, Sheriff; ALMON SPENCER, CHARLES MAYNE, Louis Heitman, Copartners under the Firm Name of Spencer, Mayne & Heitman; Elmer J. Anderson, James F. Anderson, and J. L. Dilworth, Copartners under the Firm Name of Anderson Bros. & Co.; George F. Danser, P. H. Maloney, and William Luppold, Appellants.

To Fletcher Maddox, plaintiff, and William Gaddis, intervenor, and to their and each of their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington on the first Monday of December next, pursuant to the petition and allowance of appeal filed in the clerk's office of the supreme court in the Territory of Montana, wherein William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George F. Danser, P. H. Maloney, and William Luppold are appellants, to show cause, if any there be, why certain final judgment in favor of the above-named Fletcher Maddox, plaintiff, and William Gaddis, intervenor, rendered
102 against said appellants, as in said petition for an appeal mentioned, should not be corrrcted and reversed and speedy justice done as between the parties aforesaid in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of October, A. D. 1889.

HENRY N. BLAKE,
Chief Justice of the Supreme Court of the Territory of Montana.

Due service of the foregoing citation admitted this 22 day of October, A. D. 1889.

WADE, TOOLE & WALLACE,
Att'ys for Pl'ff.
CARPENTER, BUCK & HUNT,
Att'ys for Intervenor.

Filed Oct. 22nd, 1889.

R. L. WORD, *Clerk.*

103 *Undertaking.*

Supreme Court of the United States.

FLETCHER MADDOX, Plaintiff, and WILLIAM GADDIS, Intervenor, Appellees,
versus
WILLIAM RADER, Sheriff; ALMOND SPENCER, CHARLES MAYNE, Louis Heitman, Copartners under the Firm Name of Spencer, Mayne & Heitman; Elmer J. Anderson, James T. Anderson, and J. L. Dilworth, Copartners under the Firm Name of Anderderson Bros. & Co.; George F. Danzer, P. H. Maloney, and William Luppold, Appellants.

Know all men by these presents that we, William Rader, Almond Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James T. Anderson, J. L. Dilworth, George F. Danzer, P. H. Maloney, and William Luppold, as principles, and D. E. Folson and B. R. Sherman, as sureties, are held and firmly bound unto Fletcher Maddox and William Gaddis in the sum of seven thousand ($7,000) dollars, to be paid to the said Fletcher Maddox and William Gaddis, their executors or administrators, and which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of October, A. D. 1889.

104 Whereas the above-named William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James T. Anderson, J. L. Dilworth, George F. Danzer, P. H. Maloney, and William Luppold have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Montana:

Now, therefore, the condition of this obligation is such that if the above-named William Rader, Almon Spencer, Charles Mayne, Louis Heitman, Elmer J. Anderson, James T. Anderson, J. L. Dilworth, George F. Danzer, P. H. Maloney and William Luppold shall prosecute their said writ of error to effect and pay such sum as may be recovered for damages, for delay, and costs and interest on this appeal, then the above obligation to be void; otherwise of force and effect.

WILLIAM RADER.
ALMON SPENCER.
CHARLES MAYN.
LOUIS HEITMAN.
ELMER J. ANDERSON.
JAMES T. ANDERSON.
J. L. DILWORTH.
GEORGE F. DANZER.
PATRICK H. MALONEY.
WILLIAM LUPPOLD.
D. E. FOLSOM.
B. R. SHERMAN.

105 TERRITORY OF MONTANA, } ss:
County of Meagher, }

D. E. Folsom and B. R. Sherman, being first duly sworn, each for himself, not one for the other, says: I am one of the sureties on the foregoing bond; I am worth the penal sum of seven thousand dollars over and above my debts and liabilities and property by law exempt from execution.

D. E. FOLSOM.
B. R. SHERMAN.

Subscribed and sworn to before me this 15th day of October, A. D. 1889.

N. B. SMITH,
Notary Public.

The foregoing undertaking is approved as to amount, form, and sufficiency of the sureties, and a supersedeas is hereby allowed this 22nd day of October, A. D. 1889.

HENRY N. BLAKE,
Chief Justice Supreme Court, Montana.

Filed October 22nd, A. D. 1889.

R. L. WORD, *Clerk.*

106 *Petition for Appeal.*

UNITED STATES OF AMERICA, ss:

In Supreme Court.

FLETCHER MADDOX, Plaintiff, and WILLIAM GADDIS, Intervenor, Respondents,
versus
WILLIAM RADER, Sheriff; ALMON SPENCER, CHARLES MAYN, Louis Heitman, Copartners under the Firm Name of Spencer, Mayne & Heitman; Elmer J. Anderson, Jas. T. Anderson, and J. L. Dilworth, Copartners under the Firm Name of Anderson Bros. & Co.; George F. Danzer, P. H. Maloney, and William Luppold, Appellants.

To the honorable Supreme Court of the United States:

The above-named defendants and appellants, William Rader, Almon Spencer, Charles Mayn, Louis Heitman, Elmer J. Anderson, James F. Anderson, J. L. Dilworth, George F. Danzer, P. H. Maloney, and William Luppold, conceiving themselves grieved by the final judgment made and entered in the supreme court of the Territory of Montana in the above-entitled action on the 5th day of October, A. D. 1889, do hereby appeal therefrom and from the whole and every part thereof to the honorable the Supreme Court of the United States, and respectfully pray that the judgment of the said supreme court of the Territory of Montana, the complaint, answer, pleadings, evidence, and proceedings in the *the* said cause may be sent to the Supreme Court of the United States without delay,
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and that the said Supreme Court will proceed to hear the said cause anew, and that the said judgment of the said supreme court of the Territory of Montana and every part thereof may be reversed and a decree made and entered therein dismissing said judgment with cos s or such other decree as to the said Supreme Court shall seem just.

SANDERS & CULLEN,
Attorneys for Appellants.

And now, to wit, on this 22nd day of October, A. D. 1889, it is—
Ordered that the foregoing appeal be allowed as prayed for.

HENRY N. BLAKE,
Chief Justice of the Supreme Court of the Territory of Montana.

Filed October 22nd, A. D. 1889.

R. L. WORD, *Clerk.*

108 In the Supreme Court of the Territory of Montana.

FLETCHER MADDOX, Plaintiff, and WILLIAM GADDIS, Intervenor, Respondents,
vs.
WILLIAM RADER, Sheriff, *et al.*, Appellants.

TERRITORY OF MONTANA,
County of Lewis & Clarke, } *ss:*

I, R. L. Word, clerk of the supreme court of the Territory of Montana, do hereby certify that the above and foregoing is a full, true, and correct copy of the transcript on appeal to the supreme court of Montana Territory, of the opinions of said supreme court, of the judgment of said court, and of all the orders, motions, and papers on file and of record in said court in the case of Fletcher Maddox, plaintiff, and William Gaddis, intervenor, respondents, *vs.* William Rader, sheriff, *et al.*, appellants.

Witness my hand and the seal of said supreme court this 23rd day of October, A. D. 1889.

[Seal Supreme Court Montana Territory.]

R. L. WORD,
Clerk of the Supreme Court of the Territory of Montana.

Endorsed on cover: Case No. 13,917. Montana Territory supreme court. No. 285. William Rader, Almon Spencer, Charles Mayne, Louis Heitman, *et al.*, plaintiffs in error and appellants, *vs.* Fletcher Maddox and William Gaddis. Filed November 11, 1889.

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JAMES H. McKENNEY,
CLERK.

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Supreme Court of the United States.

October Term, 1892.—Term No. 285.

WILLIAM RADER et al., Plaintiffs in Error and Appellants,

vs.

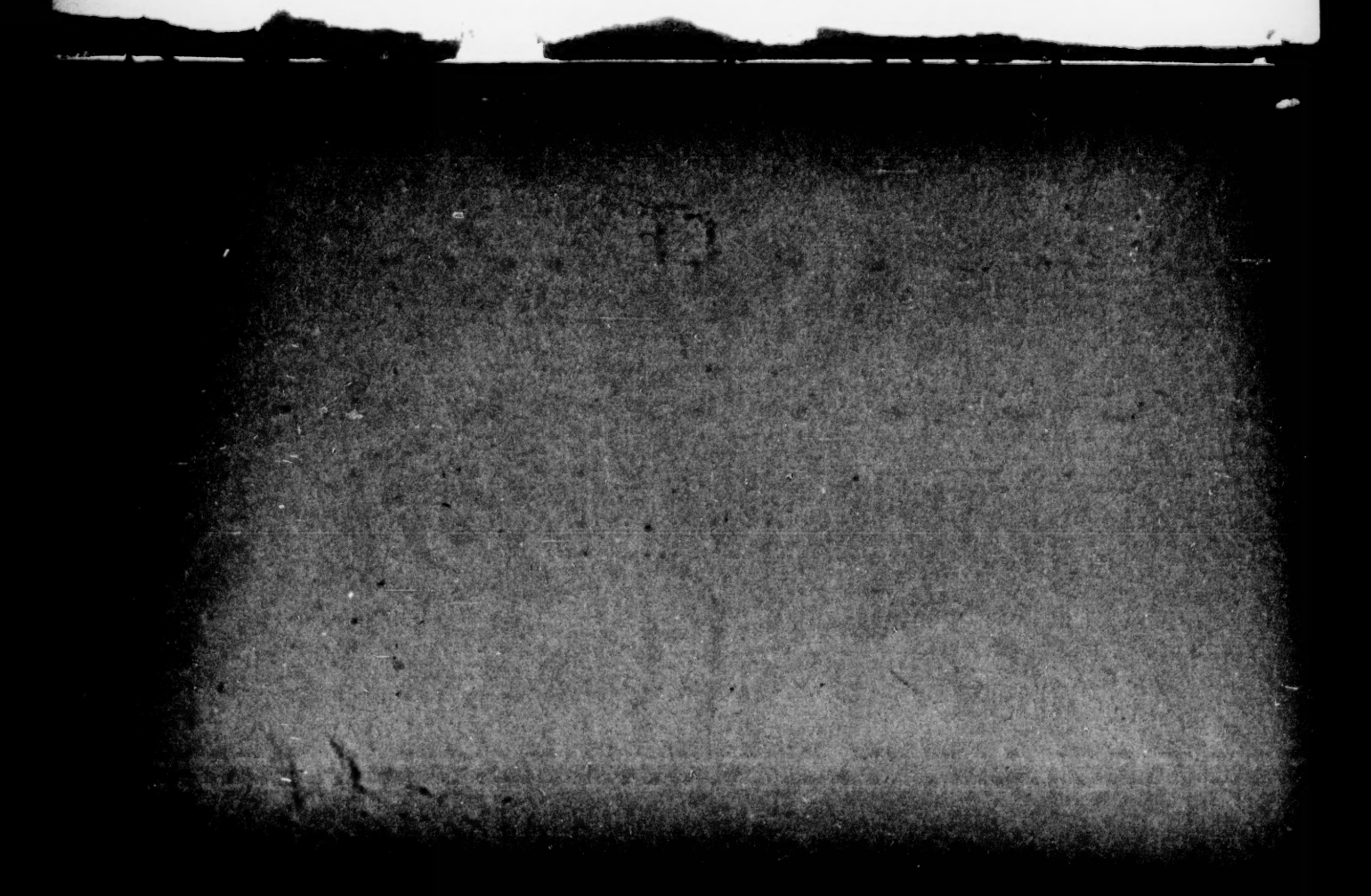
FLETCHER MADDOX and WILLIAM GADDIS.

In Error to and Appeal from the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

A. H. GARLAND,
H. J. MAY,
For Plaintiffs in Error and Appellants.

Press of McGILL & WALLACE, Washington, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1892.—TERM NO. 285.

WILLIAM RADER *et al.*, Plaintiffs in Error and Appellants,

vs.

FLETCHER MADDOX and WILLIAM GADDIS.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

Statement of Facts.

This is an action brought against William Rader, sheriff of Meagher County, Montana, and his bondsmen, upon his official bond, to recover on behalf of Maddox the sum of $5,314.69, with interest thereon at 10 per cent. from September 15, 1887. (Rec., 1–3, and Exhibits A and B, Rec., 3–8.)

William Gaddis, by leave of the court, filed his complaint of intervention, in which he alleged there was due to him from Rader the sum of $1,927.18, and demanded judgment in damages against Rader and his bondsmen in the sum of $5,000. (Rec., 8–11; Exhibits A and B, Rec., 12–16.)

Rader demurred to the complaint of Maddox, and the bondsmen also filed a separate demurrer thereto. (Rec., 16–17.)

These demurrers were overruled (Rec., 17). An answer was then filed to the complaint of Maddox embracing a counter claim for $400 (Rec., 17–19), to which Maddox replied (Rec., 19–20). The bondsmen filed their demurrer to the intervening complaint of Gaddis, which was also overruled. (Rec., 21.)

An answer was then filed to the intervening complaint, to which Gaddis replied (Rec., 21–25). Upon the issues thus joined the case came on regularly for trial before the jury; testimony of witnesses was taken on behalf of Rader, and after the introduction of the same the counter claim was withdrawn from the consideration of the jury, and thereupon the defendants rested. (Rec., 25–29.)

Rader had testified to the authority given him by N. B. Smith as the "*agent and attorney*" of Maddox and Gaddis (Rec., 25) to sell the horses covered by the chattel mortgage, under its terms, and by reason of which sale this suit has arisen, and having made such proof the counsel for the defendants announced that they did not expect to prove any special authority in Smith, but that they relied solely on the general authority of Smith as shown by the mortgage, which included the endorsement thereon, and which had been placed in the sheriff's hands for foreclosure. (Rec., 29.)

A motion was then made on behalf of the plaintiffs to strike out and withdraw from the jury all the testimony of the defendants relative to Smith's directions given at the foreclosure sale as the *agent and attorney* of the mortgagees, which motion was granted, and an exception reserved by the defendants. (Rec., 29–30.)

The trial court then withdrew the case from the jury, and rendered judgment in favor of Maddox against

Rader alone for $1,949.18, and against Rader and his bondsmen for $3,898.18, making in all $5,846.16, and judgment was also rendered in favor of Gaddis against Rader alone for $518.07, and against Rader and his bondsmen for $1,601.82, making in all $2,119.89. (Rec., 29–33.)

It will be observed that the judgment exceeds the penalty of the bond, which is $5,000.

An appeal was taken by Rader and his co-defendants from the judgment of the trial court to the Supreme Court of the Territory of Montana, and errors assigned (Rec., 33–4). Counsel for Maddox moved in the trial court to strike the complaint of intervention of Gaddis from the files, but the motion was overruled (Rec., 36–39). A bill of exceptions was signed on this ruling at the instance of Maddox, but no appeal was taken and it does not appear to be a matter for the consideration of this court.

The appeal was argued in the Supreme Court of the Territory, and an opinion delivered by Blake, C. J., concurred in by DeWolfe, A. J., affirming the judgment of the court below (Rec., 40–45). A dissenting opinion was delivered by Liddell, A. J. (Rec., 45–50). A writ of error was allowed from the Supreme Court of the Territory to this court (Rec., 51–56). An appeal was also allowed (Rec. 56–57).

The answers to the respective complaints of the plaintiff and the intervenor are sustained by the evidence, which was stricken out by the trial court. These facts are well stated in both the majority and dissenting opinions (Rec., 40–1; 45–6). The dissenting judge has set out in his opinion what he claims are the undisputed facts in the case, and we adopt his statement, as follows:

"P. D. Kinyon borrowed $10,313.00 from William Gaddis and Fletcher Maddox, for which he gave two notes on the 9th of July, 1886, one to Gaddis for $3,000.00

and another to Maddox for $7,313.00, and on the same day executed a chattel mortgage on a herd of horses to secure the payment of the notes, and stipulated therein that upon default in the payment the sheriff was empowered to take possession and sell the mortgaged property after 5 days' advertisement, either at private or public sale, and apply the proceeds to the payment of the mortgage debt. Default having been made, the two creditors placed the mortgage in the hands of their attorney, who delivered it to the sheriff, William Rader, with the following endorsement thereon:

"To the sheriff of Meagher County, Montana Territory: You are hereby authorized to execute the power of sale contained in a certain chattel mortgage, of which within is a true copy.

"Fletcher Maddox and William Gaddis, by N. B. Smith, their *agent and attorney.*"

Under this order the sheriff took possession of several hundred head of horses and advertised them for sale on the 30th of August, 1887.

At this sale, which was attended by the creditors' attorney, a man by the name of Kier bid off about $1,100.00 worth of horses, when the sheriff refused to cry his bids any longer. Kier replied that he wished to purchase to the extent of several thousand dollars; that he had $2,000.00 in bank which he would place in the hands of the sheriff, and also leave any stock which he might purchase in the sheriff's possession until he should pay the balance of the purchase-money, which he could readily do in five days; if he failed to comply with his bid the money and horses should be forfeited to the mortgagees. The sheriff referred the matter to the mortgagees' attorney, who after some discussion directed the sheriff to proceed with the sale, which was accordingly done.

On that occasion Kier continued his bids, and on the day following he was represented by his attorney, one Watterman, who, under a written power from Kier, bid off $1,600.00 worth of horses for him, making his bids reach about $8,096.50.

On inquiry at the bank it was found that Kier did not have more than $1,752.00, but this was turned over to the sheriff on the second day of the sale, which lasted for five days. Mr. Watterman's bids were on the fifth day, and before they were received by the sheriff he displayed his written power, and again the matter was referred to the creditors' attorney, who upon being shown that the amount of money already in the sheriff's hands was sufficient to cover any loss and expenses from a resale of the property, said to the sheriff: "It is all right, and you can go ahead with the sale;" and thereupon Watterman made the purchases referred to. Kier's purchases in the aggregate amounted to $8,096.50, and thereafter, the mortgagor having paid the difference between the bids of Kier and the debts and costs, the sheriff released the rest of the mortgaged property. The horses purchased by Kier (142 in number) with the $1,752.00 remained in the sheriff's hands.

Kier failed to comply with the bid, and the sheriff, after paying costs and attorneys' fees, apportioned the money in hand between the two creditors—that is, $3,192.93 to Maddox, and $1,591.57 to Gaddis—and also tendered the horses, 142 head, to the mortgagees, who received the money, but refused to take the horses, and failed to direct what disposition was to be made of them.

Subsequently the sheriff sold 23 head of horses at private sale for $1,275, from which he deducted costs of herding, breeding, and keeping the same, and tenders the balance with the horses if the plaintiffs will accept."

The facts above stated are sustained by all the witnesses who testified in the case. (Rec., 25–29.)

Assignment of Errors.

1. The court erred in sustaining the motion to strike out the evidence of conversations of N. B. Smith, the "*agent and attorney*" of Maddox and Gaddis, which showed

Smith's instructions and directions to Rader to sell and hold the horses subject to the order of said mortgagees, and also to hold the money subject to forfeiture, under the agreement set forth in the answers of the defendants, and in withdrawing such evidence and the case from the jury, and in rendering judgment for the plaintiff and intervenor without the introduction of testimony in behalf of said plaintiff and intervenor.

2. The court erred in rendering judgment against the sureties on Rader's official bond for a sum greater than the penal sum named in such bond.

3. The court erred in entering judgment for the defendants in error and appellees herein against such of the plaintiffs in error and appellants as are sureties on the bond of Rader as sheriff in an action arising against said Rader only.

I.

As to the Agreement Contained in the Answers.

The decision of the court below rests mainly upon the questions raised by the first assignment of errors (Rec., 29–31). That the sale of the horses was made to Kier according to the agreement as alleged in the answers is beyond dispute. It is true that Maddox and Gaddis endeavor to escape the force and effect of the agreement by replying that their "*agent and attorney,*" Smith, exceeded his authority, and the court below sustained this contention in its majority opinion (Rec., 19, 23, 43). But Maddox and Gaddis were not present at the sale, nor did they personally take part in any of the proceedings. N. B. Smith, "*their agent and attorney,*" was the only person really known to Rader, the sheriff, in the transaction. He authorized the sheriff to execute the sale under the chattel mortgage, attended the sale and directed the sheriff to proceed when the sheriff's judgment prompted him to cease entertaining and crying the bids of

Kier, who was the only person bidding for the property. It was the intention of the sheriff to do his whole duty, and the fairness of his conduct and honesty of intention can not be questioned. He did his duty according to his own understanding in connection with the directions of the "*agent and attorney*" of Maddox and Gaddis.

Smith had absolute control of the chattel mortgage, and inasmuch as authority had been conferred on him to authorize the sale of the mortgaged property, he had the power to stop the sale or to direct it to be proceeded with, as he did under the circumstances that confronted the sheriff and himself, and which resulted in the agreement set out in the answers; in other words he was there to direct that the sale be conducted according to law, as he understood it, and in the interest of his principals.

He executed his authority as *agent and attorney* without exceeding his powers. Smith was not acting for his clients at a judicial sale, dependent upon judicial proceedings, as an attorney-at-law, but rather as the "*agent and attorney*" of the parties to the chattel mortgage, under an agreement entered into by them conferring power on the sheriff, when properly empowered, to seize and sell the mortgaged property, upon default of payment of the notes or interest due thereon. The laws of the Territory of Montana authorized the sheriff to make such sales, and also authorized such agreements in chattel mortgages.

Authority to act as an "*agent and attorney*" goes beyond the mere acts of an agent in general, or those of an attorney-at-law, but combines both.

2 Kent. Com., 612 and notes, 622 and notes. (Holmes, 13th ed.)

Therefore, under the conditions upon which the sheriff proceeded to make the sale in this case, we deny that the rule of law invoked by the majority of the court below, with reference to an attorney-at-law and client, applies here. (Rec., 43.)

It was not a sale in which Smith undertook to receive anything except money in payment of the mortgage debt; nor was it a sale on credit. It was a cash sale under an agreement to forfeit the money turned over to the sheriff by Kier, provided the whole amount of his bids was not paid in five days, and to hold the horses bid in by Kier, if not paid for in five days, subject to the further order of Maddox and Gaddis, the mortgagees.

This was a perfectly legitimate arrangement, which was not made for the benefit of the sheriff, but in the interest of Maddox and Gaddis; and it seems to us that they are now estopped from setting up want of authority in their agent Smith to make this agreement. (1 Par. Con., [7th ed.] *51; 2 Kent., *sup.*)

If the client and principal suffer by the ignorance or indiscretion of the "*agent and attorney*," the officer and his sureties shall not be prejudiced, for the "*agent and attorney*" may give such directions to the officer as shall excuse him from his general duty, and those directions, if followed by the officer, will exonerate him and bind the client and principal.

Walters *v.* Sykes, 22 Wend., 568;
Gorham *v.* Gale, 7 Cow., 739;
Crowder *v.* Long, 8 Barn. & Cres., 605.

Kier failed to pay in five days as he promised, and forfeited the sum of $1,752.15. The horses bid on by him were never delivered. He never had title to or possession of them. It was only a contemplated sale, and was incomplete in every respect. The horses remained in the possession of the sheriff subject to the order of the mortgagees, or their "*agent and attorney*," Smith. No order was given. Rader regarded and treated the agreement with Smith as binding, and was powerless to dispose of the horses bid on by Kier without such an order. Kinyon, the mortgagor, was ready to pay the balance due on the

notes, tendered the amount, and demanded the return of the horses which were not held subject to the order of the mortgagees. Rader pursued the only fair and sensible course open to him under the circumstances. He notified the mortgagees of Kier's failure to pay; that the horses bid on by Kier were held subject to their order, and, on failure to direct what disposition should be made of them, he tendered them to the mortgagees, who declined to receive them. He has ever since held the horses subject to the order and disposal of the mortgagees. He then disposed of the cash in his hands as shown in his answers. Maddox received $3,192.93 and Gaddis $1,591.57. (Rec., 18.)

As above stated, Maddox and Gaddis were not present at any time during the effort of the sheriff to sell the horses. If they had been on the ground when Kier made his bids and Rader declined to cry them, they could have entered into a like agreement to the one made by their *agent and attorney*, Smith. There was no evidence that Smith was not authorized to do whatever his principals, if present, could have done on that occasion. The presumption is that the scope of his authority was the same. There is no dispute about Smith's authority to act as the *agent and attorney* of Maddox and Gaddis. That he was their *agent and attorney* is admitted, and, so far as the facts show, he had full charge, management, and control of the business of his principals. If this is so, then the question is as to the scope of his power and authority. It has been held that the acts of an agent within the apparent and ostensible scope of his authority, though in excess thereof, and even when contrary to instructions, are binding upon the principal. (Winchell *v.* National Exp. Co., [Vt.], 23, At. Rep., 728; Barnett *v.* Glutting, [Ind. App.], 29 N. E. Rep., 927; Tradesman Bank *v.* Astor, 11 Wend., 87; Com. Bank, etc., *v.* Kortright, 22 *Ib.*, 348; Butler *v.* Maples, 9 Wall., 766.)

Smith, as "*agent and attorney,*" necessarily possessed the same power and authority that Maddox and Gaddis could have exercised if personally present. The court below erred, therefore, in holding upon the facts in the case that the authority of Smith came within the strict rule of the powers of an attorney at law, as shown by the authorities relied on (Rec., 43). There was a question as to the scope of his powers and authority under the evidence which should have been passed upon by the jury. It was error, then, for the court to strike out the evidence on this point, and to withdraw such evidence, and the case, from the jury, and to enter judgment upon the pleadings.

We may remark here that under the terms of the chattel mortgage the mortgagees could have seized and sold the mortgaged property without the aid of the sheriff (Rec., 14). By the statutes of the Territory of Montana it was made lawful, however, for the sheriff to perform these duties when properly authorized (Comp. Stat., 5th Div., secs. 1550, 1551). These sections are copied in the majority opinion of the court below. (Rec., 42.)

Ratification of Smith's Agreement by his Principals.

No effort was ever made by Smith or his principals to rescind the agreement set out in the answers as a defense in this action; but on the contrary, the pleadings and the proofs show a ratification of the agreement by Maddox and Gaddis, who accepted and received the proceeds and immediate fruits of the said agreement. (Rec., 19–20, 23–5.)

The money paid by Kier to the sheriff in accordance with the agreement, namely, $1,752.15, was paid over by the sheriff to Maddox and Gaddis. This is expressly admitted in the replications (Rec., 19–20, 23–5). They received the money resulting solely from the agreement,

have kept it, and notwithstanding this, propose to repudiate the whole transaction upon the ground that Smith, their *agent and attorney*, exceeded his power and authority, and they do not as much as offer to restore this money which they admit they obtained under the agreement that they now attempt to disavow. It appears from the replications that Maddox and Gaddis had full knowledge of the agreement, yet they did not disavow it, but took its fruits and are benefited by it. By such acts they ratified and adopted the agreement of their *agent and attorney*, Smith. They could not accept the beneficial part of it and reject the remainder. This is well settled. (1 *Par. Con.*, 7th ed., *49, *50, *51, *52, and notes.)

Such ratification may be inferred from the acts of the principal (Bearce *v.* Bowker, 115 Mass., 129; Gibson *v.* Norway Bank, 69 Me., 579).

The cases that support this proposition of ratification and adoption of an agent's acts are numerous:

Drennan *v.* Walker, 21 Ark., 539; Seago *v.* Martin, 6 Heisk., 308; Fort *v.* Coker, 11 *Ibid.*, 579; Newall *v.* Hurlbutt, 2 Vt., 551; Burgin *v.* Haniss, 47 *Id.*, 322; Benedict *v.* Smith, 10 Paige, 128; Farmers' L. & T. Co. *v.* Wallworth, 1 N. Y., 433; Crans *v.* Hunter, 28 N. Y., 389; Elwell *v.* Chamberlain, 31 N. Y., 611; Fowler *v.* N. Y. Gold Exch., 67 *Id.*, 138; Corning *v.* Southland, 3 Hill, N. Y., 552; Moss *v.* Rossei Co., 5 *Id.*, 137; Widner *v.* Lane, 14 Mich., 124; Henderson *v.* Cummings, 44 Ill., 325; Cochrane *v.* Chitwood, 59 *Id.*, 53; Krider *v.* Weston College, 31 Iowa, 547; Beidman *v.* Goodell, 56 *Id.*, 592; Roberts *v.* Rumler, 58 *Id.*, 301; Warder *v.* Pates, 57 *Id.*, 515; Southern Ex. Co. *v.* Palmer, 48 Ga., 85; Hunter *v.* Stembridge, 17 *Id.*, 243; Hardeman *v.* Ford, 12 *Id.*, 205; Menkens & Watson, 27 Mo., 163; Joslin *v.* Miller, 15 N. W. Rep., 214; New England M. I. Co. *v.* DeWolf, 8 Pick., 63; Culver *v.* Ashley, 19 *Id.*, 200; Hovey *v.* Blanchard, 13 N. H., 145; Tasker *v.* Kenton Ins. Co., 59 *Id.*, 438;

Strasser *v.* Collins, 54 Wis., 102; Babcock *v.* Deford, 14 Kan., 408; Coleman *v.* Stark, 1 Oregon, 115; Rudasill *v.* Falls, 92 N. C., 222; Sartwell *v.* Frost, 122 Mass., 188; Story on Agency, sec. 250; Elwell Evans on Agency, p. 95.

There are disputed facts in this case, both as to the scope of Smith's authority as *agent and attorney* and as to the ratification and adoption by his principals of the agreement made by him, and these are questions which should have gone to the jury for consideration. There was evidence, therefore, tending to establish the issue on the part of the present plaintiffs in error and appellants, and the court below erred in taking the case from the jury.

United States *v.* Chidester, 140 U. S., 49.

II.

Did the court below err in rendering judgment against Rader and his sureties for a greater sum than the penalty of the bond? This is the question raised by the second assignment. The amount adjudged against Rader and his sureties is far in excess of the penalty of the bond, which is $5,000. (Rec., 12, 32–3.)

It is held by the majority of the court below that the responsibility of the sheriff and his sureties is not limited by the penalty named in the bond (Rec., 45). There is a dissent to this view of the law, at least so far as the responsibility of the sureties is concerned (Rec., 50). The judgment against Rader and his sureties in favor of Maddox and Gaddis amounts to $5,848.16, (Rec., 33). And this does not include the personal judgment against Rader for $2,119.89 (Rec., 33). The rule, as we understand it, would not permit a recovery against the sheriff or his sureties for damages in gross in an action on his bond for a sum greater than the penalty, and such recovery could only exceed such penalty for interest from the date the amount became due by the breach.

2 Sedg. Dam. (8th ed.), secs. 677, 678, and notes.

2 Sund. Dam., pp. 12–15, and notes.

III.

A question arises as to the liability of the bondsmen for the acts of the sheriff in making a foreclosure sale on a chattel mortgage. The provision of the bond under which they must be made liable, if at all, reads as follows: "If the said William Rader shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of sheriff required by any law to be enacted subsequently to the execution of the bond, then this obligation to be void," etc. It is under the first clause of this condition that by the judgment of the court below these sureties are held liable, and yet there is not a syllable in the statute conferring the right on the sheriff to execute the power of sale contained in a chattel mortgage which requires him to pay over to the mortgagees the moneys received at such sale. The sureties are entitled to stand upon the very letter of their bond. Their liability is *strictissimi juris*, and can not be extended beyond the scope of their engagements.

In Miller *v.* Stewart, 9 Wheat., 702, which was a case upon an official bond, Mr. Justice Story says: "Nothing can be clearer, both upon principle and authority, than that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther." In United States *v.* Boyd, 15 Pet., 207, the principle laid down in Miller *v.* Stewart is affirmed, and although the bond in suit recites as a part of its obligation that Boyd had been appointed receiver for four years from the 27th day of December, 1836, the bond was held to be prospective in its operation and the sureties could not be held to make good any defalcation of the officer which occurred prior to its date, which was the 15th day of June, 1837.

In Leggett *v.* Humphrys, 21 How., 75, the court cites with approval the language of Chancellor Kent in 3d Commentaries, p. 124, as follows: "When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled that the case must be brought strictly within the terms of the guaranty, and the liability of the surety can not be extended by implication."

It is scarcely necessary to multiply authorities in support of this familiar proposition. It has found expression in many cases, a few of which are the following:

People *v.* Pennock, 60 N. Y., 421;
Carey *v.* State, 34 Ind., 105;
Scott *v.* State, 46 Ind., 204;
Jenkins *v.* Lemonds, 29 Ind., 294;
State *v.* Given, 45 *Id.*, 267;
People *v.* Moon, 3 Scam. Ill., 123;
Nally *v.* Calloway Co., 11 Mo., 447;
City of St. Louis *v.* Sickles, 52 Mo., 122–129;
Carpenter *v.* Sloane, 20 O., p. 328;
Webb *v.* Auspach, 3 O. S., 526;
Henderson *v.* Coover, 4 Nev., 430;
Cressey *v.* Gierman, 7 Minn., p. 398;
Schloss *v.* White, 16 Cal., 66.

If the bond in suit was conditioned as is required by sec. 850, Fifth Div. Comp. Stats., prescribing the form of a sheriff's bond, it might be that the sureties would be liable for money received on a foreclosure sale under a chattel mortgage and not paid over by the sheriff to the mortgagee. A provision of the prescribed statutory bond is that he "shall pay over all moneys that may come into his hands as sheriff." There is no such provision in the bond in this case. There is no provision of law requiring the sheriff to receive or pay over the proceeds of sales of property sold by him on the fore-

closure of chattel mortgages, and it is respectfully submitted that the complaint in this case states no cause of action against the sureties unless their liability is to be extended by implication. The obligation of the bondsman is that the said Rader shall well, truly, and faithfully perform all official duties now required of him by law. This means by the provisions of any statute then enacted, for following this and as a part of the same sentence is the further clause of the condition that he shall likewise perform such other duties as may be required of him by any law to be subsequently enacted. The whole obligation, by a very familiar rule of construction, must be construed together, and the true import of any clause or phrase used be determined by the entire context. The statute (sec. 1550, Fifth Div. Comp. Stats.), after providing that the mortgagor may insert in his mortgage a clause authorizing the sheriff to execute the power of sale therein contained, further provides that "the sheriff of such county at the time of such sale may advertise and sell the mortgaged property in the manner provided in such mortgage." There is nothing said concerning the proceeds of such sale, as to whom they shall be paid by the purchaser, or what application is to be made of them. The intent of the legislature in the passage of this law, its scope and object, is made manifest by the remainder of the section. Unless the property is sold by the sheriff, either on an order of sale issued from the court in a suit for the foreclosure of the mortgage, or by virtue of a power contained in the instrument, the mortgagee can not become a purchaser at his own sale. The law may be deficient in its provisions for the complete protection of the parties, but if so, this is a matter for the consideration of the legislature and not of the court. It is the duty of the court to construe the law as it finds it, and not to extend its terms beyond the clear import of the language used.

A mortgagee of personal property does not, according to the weight of authority, fall within the principle that prohibits a trustee from becoming a purchaser at his own sale.

Herman on Chattel Mortgages, sec. 219.

The whole object of the enactment under consideration seems to have been to bring him within that rule unless the sale is made by a sheriff. Nothing is prescribed in the statute as to how or to whom payment shall be made or how the proceeds of such shall be applied. In Rose *v.* Whitney, 7 Mont., pp. 385–394, it is held that in making the sale the sheriff performs an official duty, and the court says: "If he were acting solely as the agent of the parties, or either of them, no statute would be necessary; but inasmuch as he acted under the requirements of the law, he must have been performing an official duty." As we have already seen there is no "requirement of law" prescribing how the proceeds of such sale shall be applied and therefore it must be that in this respect the sheriff acts as agent of one or the other of the parties to the mortgage. In that case the sureties on the sheriff's bond are not liable.

Herman (*supra*), 216.

The attention of the court is respectfully called to the reasoning in the dissenting opinion of Associate-Justice Liddell. (Rec., 45, *et seq.*)

And we submit the case should be reversed.

A. H. GARLAND,
H. J. MAY,
For Plaintiffs in Error and Appellants.

150 US 128

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Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 285.

WILLIAM RADER AND OTHERS, PLAINTIFFS IN ERROR,

vs.

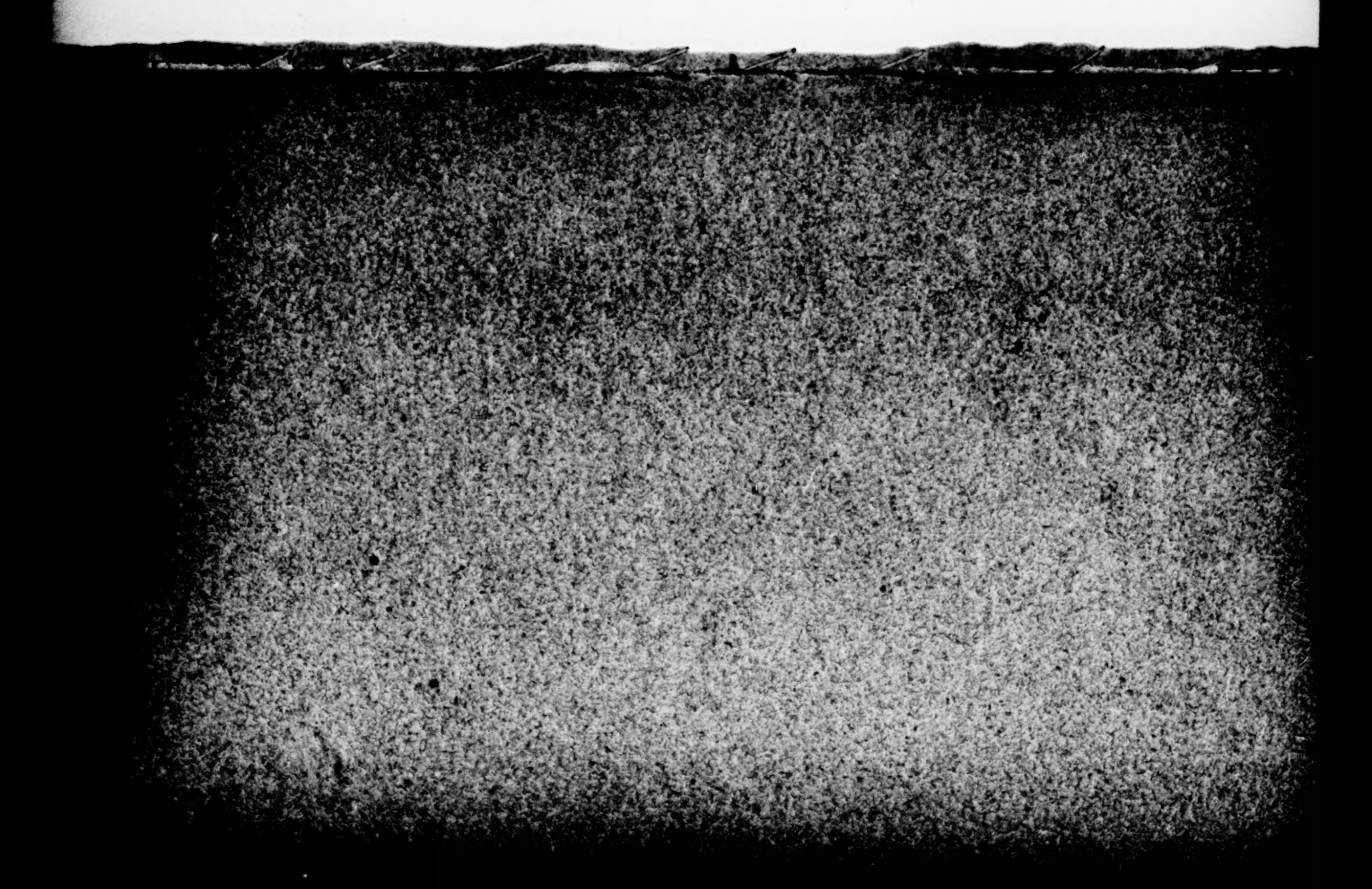
FLETCHER MADDOX AND WILLIAM GADDIS.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief on Behalf of Fletcher Maddox, One of the Defendants in Error.

M. F. MORRIS,
Attorney for Defendant in Error, F. Maddox.

JUDD & DETWEILER, PRS., WASHINGTON, D. C.



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I.

STATEMENT OF CASE.

Both a writ of error and an appeal have been resorted to in this case, presumably for abundant caution. But the case seems to be one proper for a writ of error, and not for an appeal.

William Rader, plaintiff in error, was the sheriff of Meagher county, in the Territory of Montana; and the other

plaintiffs in error were the sureties on his official bond. The suit was instituted by Fletcher Maddox, one of the defendants in error, for an alleged breach of this bond by the sheriff's failure properly to execute a chattel mortgage that had been placed in his hands for execution in accordance with the laws of the Territory. The other defendant in error William Gaddis was permitted to intervene as co-plaintiff for the reason that he was protected by the same mortgage.

It appears that on July 9, 1886, one Kinyon executed a chattel mortgage of 400 horses to the plaintiff below Fletcher Maddox to secure the payment to him of a promissory note for $7,313, and to the intervenor William Gaddis to secure the payment to him of a promissory note for $3,000. This mortgage is given on pages 5 to 7 of the Record as an exhibit to the complaint. There does not appear to have been any connection between the two notes, or between the payees mentioned in the notes, other than they were both secured by the one mortgage. Both notes were payable one year after date. Default was made in their payment; and the mortgage was, by one N. B. Smith as attorney for Maddox and Gaddis, placed in the hands of the sheriff for execution, there being contained in it a power to the sheriff so to execute it.

This was done under the following provisions of law in force in Montana:—

"It shall be lawful for the mortgagor of goods, chattels, or personal property, to insert in his mortgage a clause authorizing the sheriff of the county in which such property or any part thereof may be, to execute the power of sale therein granted to the mortgagee, his legal representative, and assigns, in which case the sheriff of such county, at the time

of such sale, may advertise and sell the mortgaged property in the manner prescribed in such mortgage."

Compiled Statutes of Montana, sec. 1550.

"The sheriff making a sale of mortgaged property, as in the foregoing section provided, shall be entitled to receive as his compensation the same fees as upon sales of personal property on execution."

Compiled Statutes of Montana, sec. 1551.

Rader, as sheriff, thereupon assumed the execution of the trust, took possession of the mortgaged property, and advertised it for sale (Rec. pp. 2, 30). The sale occupied several days. One Kier was a bidder at it. He bought some of the horses, and paid cash for them to the amount of $1,752. Kier went on to bid farther; but as it was assumed, it seems, that he had no more money, a conference was had between the sheriff, the auctioneer, Keir, and Smith, who, as attorney for the defendants in error, had put the mortgage in the hands of the sheriff for execution. Smith told the sheriff to "go on with the sale." This was the only direction he gave him. From it the sheriff claims that he was justified in inferring that he, the sheriff, might accept the proposition made by Keir, which was to the effect that he would leave all the horses purchased or to be purchased by him in the hands of the sheriff, together with the money ($1,752) already paid by him, all to be forfeited by him in the event that he should not pay in full in five days. He did not pay. The sheriff thereupon notified Smith of his failure, and tendered to the latter the forfeited horses and the balance of the money in his hands after the payment of the expenses. Smith declined to receive the horses, repudiated any connection with the sheriff's arrangement, and

stated that he wanted the money due on the mortgage, and not the horses. The sheriff afterwards sold about twenty-two of the horses for $1,275; and turned over the residue to Kinyon, the mortgagor, for a check of some other person to the amount of something upwards of $2,459.20. Whether this check was ever paid or not, does not appear. The sum total of Kier's bids at the sale, which were not paid, was $8,096. The whole sales to him, cash ($1,752) and credit ($8,096), and some sales it seems to others, amounted in the aggregate to $10,735. And counting the sum received, when the horses were released to the mortgagor, the sheriff was chargeable with the total sum of $13,294.20. The costs of sale were about $1,300. The amounts due on the respective notes were $5,314.69 to Maddox, and $1,927.18 to Gaddis as of the 15th day of September, A. D. 1887. All these facts appear on pages 25, 26, 30, 31, 32 of the Record. Demand was made on the sheriff to pay; and he refused. Thereupon Maddox instituted this suit.

The bond of the sheriff, upon which the suit was brought, is found on page 3 of the Record. It is conditioned that if the sheriff "shall well, truly, and faithfully perform all official duties now required of him by law, and shall truly and faithfully execute and perform all the duties of such office of sheriff required by law to be enacted subsequently to the execution of this bond, then this obligation to be null and void and of no effect; otherwise to remain in full force and virtue."

The provision of the law of Montana under which the bond was given is as follows:

"The condition of such bond shall be in substance as follows: * * * That if the said —— —— shall well and

faithfully perform and execute the duties of the office of sheriff of said county of —— during the continuance in office by virtue of said election, without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as sheriff, and shall deliver to his successor all writs, papers, and the things pertaining to his office which may be so required by law, then," &c., &c.

Compiled Statutes of Montana, sec. 850.

To the complaint both the sureties and the sheriff demurred, the former on the ground that the bond was executed to the Territory of Montana, and there was no assignment of it to the plaintiff, and that the sureties were improperly joined in the suit with the sheriff; and the latter on the ground that Gaddis had not been made a party. The demurrer was overruled; and the defendants filed an answer, to which the plaintiff replied, and joined issue (Rec., pp. 17–19).

Before the filing of this answer, Gaddis asked leave and was permitted by the court, over the objection of Maddox, to intervene in the cause as a plaintiff; and in his complaint he set forth his claim (Rec., p. 8). To this complaint there was also a demurrer joined in by all the plaintiffs in error, on the same grounds substantially as their demurrer to the complaint of Maddox—alleged misjoinder (Rec., p. 21). This demurrer was also overruled; and the defendants answered; and to the answer the intervenor Gaddis filed his replication (Rec., pp. 21–25).

There was a trial before a jury (Rec., p. 25). Testimony was adduced (Rec., pp. 25–29). The plaintiffs in error, having admitted all the material allegations of the complaint of Maddox and Gaddis, voluntarily assumed the burden of proof, abandoning, however, a counter-claim set up by them;

and all the testimony in the case is the testimony adduced by them (Rec., pp. 29, 31).

The gist of the controversy is set forth in the one bill of exceptions taken in the case (Rec., pp. 30, 31). In it the sheriff seeks to justify his action in regard to Kier's bids on the ground of the alleged instructions from Smith to receive them. The plaintiffs moved to exclude the testimony in regard to the conversation between Rader, Smith, and Kier at the time of sale. The court did exclude it; and this action of the trial court is the subject of the bill of exceptions.

Subsequently, there being no other testimony in support of the claim of the plaintiffs in error, the court withdrew the cause from the jury, and rendered judgment in favor of Maddox and against Rader for the sum of $1,949.98; and in favor of Maddox and against Rader and his sureties for the sum of $3,898.18; and in favor of Gaddis and against Rader for the sum of $578.07; and in favor of Gaddis and against Rader and his sureties for the sum of $1,601.82. There is no exception, however, or bill of exceptions taken to the action of the court in this regard.

Upon appeal to the supreme court of the Territory, the judgment of the trial court was affirmed (Rec., p. 50). And thereupon both a writ of error and an appeal were taken to remove the cause to this Court (Rec., pp. 52–57).

II.

BRIEF OF ARGUMENT.

1.

Three assignments of error are set out on behalf of the plaintiffs in error, the first and principal one being to the action of the trial court in striking out the evidence as to the conversations at the time of sale between Smith and Rader and others.

These conversations are relied upon by the plaintiffs in error as showing an agreement on the part of the defendants in error through their agent and attorney Smith that the sheriff might depart from the usual course of procedure. The usual course of procedure in enforcing a chattel mortgage is to sell the mortgaged property for cash; and the alleged arrangement here was a complicated one, entirely outside of the usual course. It is not pretended that the defendants in error had any knowledge of the arrangement or gave any authority to Smith to make it. It is in fact conceded that he had no special authority to make it, and no authority whatever in the premises, except such as was involved in his general power as "agent and attorney;" and the only evidence of this general power was the order given by him to the sheriff to execute the mortgage, in which he signs himself as "agent and attorney" (Rec., p. 30). Now, most assuredly such agency as this is no warrant for the peculiar and extraordinary arrangement proposed to be shown by the plaintiffs in error as having been made or assented to by Smith. It is a well-established rule of law that an agent or attorney, in whose hands a claim is placed for collection,

cannot, without the express consent of his client, make any arrangement for the settlement of the claim on any other basis than the payment of money.

Moulton *vs.* Bowker, 115 Mass., 36.

2 Greenleaf on Evidence, sec. 141, and cases there cited.

All argument as to the principals being bound by the actions of their agent within the scope of his authority is out of place here; for there is no question about the scope of the authority of the agent. That authority is here very clearly defined and limited both in law and in fact.

But another answer, and apparently a very conclusive answer, to the contention of the plaintiffs in error is that the testimony does not support the claim that there was any arrangement whatever assented to by Smith. The testimony (Rec., pp. 27–29) is that an arrangement was proposed, but that Smith, instead of assenting to it, directed the sheriff to "go ahead and sell the horses"—a direction antagonistic to the alleged arrangement.

2.

It is claimed that Smith's alleged agreement was ratified by his principals, by their acceptance of the money that had been received by the sheriff in the first instance from Kier.

This is a most extraordinary proposition. Kier had already bought and paid for some of the mortgaged horses before the alleged agreement or arrangement was entered into at all. And because the defendants in error received this money from the sheriff on account, it is argued that they ratified the subsequent transaction which was wholly

unconnected with this money. This argument cannot be sustained. Nor can the proposition be sustained that any payment by the sheriff on account would involve a ratification by the mortgagees of his peculiar arrangements. Of course, the defendants in error might have ratified the alleged arrangement supposed to have been made by their agent and attorney; and the long array of authorities cited by the plaintiffs in error in support of the proposition of ratification is entirely unnecessary and superfluous—simply because they have no bearing upon this controversy. But payment by the sheriff of part of the money which he had in hand can scarcely involve a ratification by the payees of his failure to have in hand other money which he should have realized and which he failed to realize through his own default.

3.

But even if there was such an arrangement as is pretended, the sheriff grossly violated his duty, when, upon the failure of Kier to consummate his agreement, he turned over the mortgaged horses to Kinyon, the mortgagor, instead of selling them. The alleged arrangement certainly contemplated a further attempt by the sheriff to sell the mortgaged property, and not an offer to turn it back to the mortgagees, and least of all the surrender of it to the mortgagor. This was plainly a violation of his official duty, and of the rights of the mortgagees: and the alleged agreement, even if it was a proper and valid agreement, is no justification of it.

4.

In the first assignment of error there is a suggestion that the rendition of judgment on behalf of the defendants in error without the introduction of any testimony on their behalf was erroneous.

Now, the record shows conclusively that the plaintiffs in error in open court "*voluntarily assumed the burden of proof and admitted all the material allegations of the complaint*" (Rec., p. 31). And the plaintiffs in error simply undertook to prove a justification of the default which they thus admitted, not to deny it or controvert it. Where is the necessity for proof of that which is admitted?

5.

The second assignment of error is based upon the rendition of a judgment against the sureties of the sheriff for a greater amount than the penal sum named in the bond.

The bond was for $5,000; the amount of the judgment against the sureties is $5,500, or $3,898.18 in favor of Maddox and $1,601.82 in favor of Gaddis. The excess of $500 is the interest on $5,000 from the time when demand was made for the payment of the money (September 17, 1887, Rec., p. 3) to the date of the judgment (September 24, 1888)—a period of one year—at the rate of ten per centum per annum, which was the legal rate of interest in the Territory.

It was the duty of both the principal and sureties to pay the sum for which the sheriff was liable as soon as the sheriff was in default; and upon their failure to do so they became

liable, not only for the principal sum detained, but also for interest upon it on account of the detention. This is not holding them for a greater amount than their bond, but for the precise amount of their bond and the usual legal penalty of interest attached to their failure to discharge their obligation under the bond. And it is also in accordance with the requirements of the laws of Montana.

2 Sedgwick on Damages, secs. 677, 678.

Comp. Statutes of Montana, Div. 5, sec. 1237.

This is conceded in the brief here filed on behalf of the plaintiffs in error (page 12).

But counsel for the plaintiffs in error has fallen into a mistake in regard to the amount of the judgment against the sureties. It is $5,500, as hereinbefore stated, and not $5,848.16, as stated in the brief of counsel for the plaintiffs in error.

6.

The third assignment of error raises the question whether the sureties on the sheriff's bond are liable for his failure to pay to the mortgagees the money which he had or should have had from the sale. And the contention is that the bond is conditioned only for the faithful performance by the sheriff of the duties required of him by law; and that while the statute confers upon the sheriff the power to execute the power of sale contained in the mortgage, there is no provision of law that requires of him to pay over the proceeds of sale to the mortgagees.

This point seems to have been made in the territorial court; but it seems rather surprising that it should be made

here. To sustain it would seem to be equivalent to digging a pitfall for the unwary, and offering a premium for official embezzlement. Mortgagees are invited by the law to place the foreclosure of their mortgages in the hands of the sheriff because he is a bonded officer of the law and presumably responsible for the faithful performance of his duties as such. But if this construction of the value of his official bond is sustained, they will now be told that, after having faithfully and regularly sold the property, he may with impunity convert the proceeds of sale to his own use. Of what value a bond is for the faithful conduct of a sale, when the ultimate result of the sale may be defeated, we are not told. The sheriff is bound to sell faithfully, but for the proceeds of sale his sureties are not to be at all responsible. Assuredly such reasoning as this will not be sustained, unless it is very clear that there is no alternative but to sustain it.

The bond, it is true, is not in the form prescribed by the statute. For some unexplained reason it differs from the statutory form. The statutory form prescribes that the sheriff "shall pay over all moneys that may come into his hands as sheriff." The bond in suit here is conditioned for the faithful performance by the sheriff of the duties required of him by law. But assuredly there is no duty more peremptorily required of the sheriff by law than to pay over to the proper parties all moneys that come into his hands in an official capacity.

7.

The defendant in error Maddox objected, as plaintiff in the court below, to the complication of his suit by the intervention of Gaddis, and took his bills of exceptions to the

action of the trial court in allowing the intervention (Rec., pp. 37–39). Having sued out no writ of error, he probably cannot complain of that intervention here, and does not desire to complain of it. But if, for any reason, this Court should be of opinion that, by reason of such intervention and the judgment in favor of the intervenor, the rights of the defendant in error Maddox are prejudiced, he submits that, in that event, due weight should be given to his objection and bill of exceptions.

8.

It is respectfully submitted that there is no error in the record, and that the judgment should be affirmed.

M. F. Morris,
Attorney for Defendant in Error, F. Maddox.

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Supreme Court of the United States.

OCTOBER TERM, 1892. TERM NO. 285.

WILLIAM RADER ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

FLETCHER MADDOX AND WILLIAM GADDIS.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief for William Gaddis, Intervenor, Defendant in Error and Appellee.

JAMES HOBAN,
for William Gaddis, Intervenor,
Defendant in Error and Appellee.

Law Reporter Print, 518 Fifth.

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Brief for William Gaddis, Intervenor, Defendant in Error and Appellee.

I. As to the first assignment of error:

The record, page 29, contains the following statement:

> "And the counsel for defendants in open court stated that they had no proof to offer, and did not expect to prove any kind or character of special authority in N. B. Smith, and relied solely upon his general authority as attorney by virtue of the mortgage having been placed in his hands for foreclosure."

On page 31, the following admission:

> "Who (the defendants) voluntarily assume the burden of proof, and admitted all the material allegations of the complaint of the plaintiff, Maddox, and the intervening plaintiff, William Gaddis."

For authorities that an attorney at law has no right

to receive anything except money in payment of a debt which has been entrusted to him for collection, without express direction from his client, see opinion of the majority of the court, page 43 of the record.

II. As to the second assignment of error.

The judgment rendered against *Rader and his sureties*, exclusive of the personal judgment against Rader, amounts to $5,500.00, that is, the amount of the penalty of the bond with ten per cent. interest thereon from the time of default in payment on demand.

Seaver *vs.* Young, 16 Vermont, p. 658.

Carter *vs.* Thorn, 18 B. Mon. (Ky.), p. 613.

III. As to the third assignment of error.

Counsel for appellants say (Brief, page 14):

> "If the bond in suit was conditional, as is required by Sec. 850, Fifth Div. Comp. Stats., prescribing the form of a sheriff's bond, it might be that the sureties would be liable for money received on a foreclosure sale under a chattel mortgage and not paid over by the sheriff to the mortgagee. A provision of the prescribed statutory bond is that he 'shall pay over all moneys that may come into his hands as sheriff.'"

In the present case, the clause just quoted is necessarily implied, even as to sureties.

United States *vs.* Babbitt, 95 U. S., p. 334.

JAMES HOBAN,

for William Gaddis, Intervenor,
Defendant in Error and Appellee.